

on the legislative intent behind the statutes. *Dugger*, 408 S.W.3d at 832. In reaching its holding that the unlawful acts doctrine was not a viable defense under the confines of the proportionate responsibility statute, the Court highlighted some of the legislative intent behind Chapter 33. *Id.* at 327. Therefore, a court will have a clearer understanding of the purpose behind the proportionate responsibility scheme and how to apply Chapter 33 to Mr. Jones' case. *Id.*

II. It is unlikely IDC will be able to successfully assert a proportionate responsibility defense.

IDC will likely be unable to assert the proportionate responsibility defense. The proportionate responsibility statute allows a tort defendant to designate as a responsible third party a person who is alleged to have caused in any way the harm for which the plaintiff seeks damages. Tex. Civ. Prac. & Rem. Code Ann. § 33.001-33.002. Once asserted, the factfinder is to determine the percentage of responsibility for “(1) each claimant; (2) each defendant; (3) each settling person; and (4) each responsible third party who has been designated under § 33.004.” Tex. Civ. Prac. & Rem. Code Ann. § 33.003. If a claimant's responsibility exceeds fifty percent, the claimant is barred from recovering any damages. Tex. Civ. Prac. & Rem. Code Ann. § 33.001.

Chapter 33 applies to “any cause of action based on a tort.” Tex. Civ. Prac. & Rem. Code Ann. § 33.002. This includes a survivorship action brought in a wrongful death case. *Dugger*, 408 S.W.3d at 831. In a wrongful death case, a “claimant” includes the person who was injured, was harmed, or died or whose property was damaged; and any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person. Tex. Civ. Prac. & Rem. Code Ann. § 33.011. Thus, when the claim involves death, “claimant” includes not only the party seeking damages, but also the decedent. *JCW Electronics, Inc., v. Garza*, 257 S.W.3d 618, 707 (Tex. 2008). Therefore, in this case, IDC

can assert the proportionate responsibility defense against any of the three claimants – Mr. Jones, his father, or his son.

The proportionate responsibility statute, however, “indicates the Legislature’s desire to compare responsibility for injuries rather than recovery,” even if the claimant was partially at fault or violated some legal standard. *Dugger*, 408 S.W.3d at 832. The Legislature’s adoption of the proportionate responsibility scheme in Chapter 33 evidenced its clear intention that a plaintiff’s illegal conduct not falling within a statutorily recognized affirmative defense be apportioned rather than barring recovery completely. *Id.* at 827. As previously mentioned, it is unlikely that the Legislature intended to attribute causation for breach of a mental health standard of care to the patient whose undiagnosed mental impairment was the very cause of the injury. *RioGrande Regional Hospital*, 392 S.W.3d at 623. Suicide is preventable. *Providence Health Center v. Dowell*, 262 S.W.3d 324, 330 (Tex. 2008). Where the decedent plaintiff did not take any actions that violated an applicable standard of care, apart from committing suicide, there is no proportionate responsibility. *RioGrande Regional Hospital*, 329 S.W.3d at 624. In asserting the proportionate responsibility affirmative defense, IDC has the burden of pleading and proving the elements. *See Id.* at 621.

There is sufficient evidence suggesting IDC’s negligence in monitoring and properly responding to Mr. Jones’ deteriorated mental health while at IDC. The Supreme Court of Texas has specifically held that suicide is preventable. *Providence Health Center*, 262 S.W.3d at 330. In *Providence Health Center*, parents of a patient who committed suicide following the discharge from emergency room where had been treated a failed suicide attempt, brought a wrongful death and a survivorship action against the defendants. *Id.* at 327-28. While the patient was in the hospital, the nurses and doctors failed to make a comprehensive assessment of his risk of suicide.

Id. at 326. Even though the Supreme Court of Texas ultimately held that there was no evidence that the defendants caused the suicide, it recognized that suicide is preventable and that had the decedent had stayed with his family as instructed, he would not have hanged himself when he did. *Id.* at 330.

In *JCW Electronics*, the Court held that a party who seeks damages for death or personal injury under a breach of implied warranty claim is subject to Chapter 33's proportionate responsibility scheme. *JCW Electronics*, 257 S.W.3d at 703. The decedent was arrested for public intoxication and placed in jail. *Id.* at 702. The following day, he made a phone call to his mom to arrange his bail. *Id.* On the day he was supposed to be released, he was found dead in his cell, hanging from the telephone cord provided by JCW Electronics. *Id.* His mom sued the city for his death and joined JCW as a defendant. *Id.* At trial, the jury attributed sixty percent of the liability to the decedent. *Id.* at 703. Although the decedent's mom argued that Chapter 33 should not apply to breach of implied warranty claims, the Court stated that these claims have been "historically included" when comparing fault in tort-based litigation. *Id.* at 707. Because the jury found the decedent sixty percent responsible for his death, for reasons not given in the case, his contributory negligence barred recovery. *Id.* The Court rendered judgment that claimants take nothing. *Id.* at 708.

Mr. Jones, like the patient in *Providence Health Center*, was under the care of staff who failed to make a comprehensive assessment risk of suicide. *Providence Health Center*, 262 S.W.3d at 326. Mr. Jones' suicide, however, happened while under the direct supervision of IDC employees, not thirty-three hours after being released by a health care provider. *See Id.* Mr. Jones' act of committing suicide was not "the sole cause of the damages sustained," but rather his death followed IDC's negligence. *See* Tex. Civ. Prac. & Rem. Code Ann. § 93.001(a)(2). Based on both

Section 33.001, the interpretation of Section 93.001 under 33.001, and the above case law, there exist sufficient facts and evidence to show that the affirmative defense of proportionate responsibility fails in this case.

Even though in *JCW Electronics*, the inmate's contributory negligence precluded recovery, there is no reason provided as to how fault was allocated. *See JCW Electronics*, 257 S.W.3d at 618. There is nothing indicating that the decedent's proportionate liability was due solely to the fact of suicide. *Id.* This missing information taken with the highly distinguishable facts of Mr. Jones' case, limits the persuasiveness of *JCW Electronics*.

Because there is no evidence that Mr. Jones' son or father played any part in Mr. Jones' death, the issue of proportionate responsibility is unlikely to extend to them in any way. Additionally, the court will likely find that Mr. Jones did not violate an applicable standard of care and is thus not proportionally liable for his suicide. While IDC has not conceded that they owed a heightened duty of care to Mr. Jones as the entity that detained him and had control over his mental health care needs, there is, in our possession, sufficient facts and evidence to show this. This case alleges, and discovery has helped establish, numerous facts that demonstrate how IDC's negligence led to Mr. Jones' death. There is nothing in our possession to support the notion that Mr. Jones is proportionally responsible.

CONCLUSION

IDC will likely be unable to successfully assert the suicide defense or the unlawful acts doctrine to shift liability to Mr. Jones and will likely be unable to assert the proportionate responsibility defense to preclude recovery. The theory of this case is that Mr. Jones' action of committing suicide was not "the sole cause of the damages sustained," but rather that his death flowed from IDC's negligence. *See* Tex. Civ. Prac. & Rem. Code Ann. § 93.001(a)(2). Based on

the facts of the case, documents in our possession, statutory interpretation, and the above case law, it seems unlikely that any fact finder would find Mr. Jones' liable for his own suicide or more than fifty percent responsible for his death. Thus, IDC will likely be unable to convince a factfinder that their affirmative defenses have any merit.

Applicant Details

First Name	Evan
Middle Initial	M
Last Name	Brown
Citizenship Status	U. S. Citizen
Email Address	ebrown4@law.gwu.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>818 N Quincy St., Unit 1004</div> <div>City</div> <div>Arlington</div> <div>State/Territory</div> <div>Virginia</div> <div>Zip</div> <div>22203</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	3176271031

Applicant Education

BA/BS From	Indiana University-Bloomington
Date of BA/BS	May 2019
JD/LLB From	The George Washington University Law School
	https://www.law.gwu.edu/
Date of JD/LLB	May 1, 2022
Class Rank	15%
Law Review/Journal	Yes
Journal(s)	Journal of Energy and Environmental Law
Moot Court Experience	Yes
Moot Court Name(s)	George Washington Law School Moot Court

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **Yes**
Post-graduate Judicial Law
Clerk **Yes**

Specialized Work Experience

Recommenders

Jernigan, Ben
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McBirney, Jimmy
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202-307-2587

Manns, Jeffrey
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Gilligan, Francis
francis.a.gilligan.civ@mail.mil

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

Evan Brown

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Address:

402 N Meridian St. #B306
Indianapolis, IN 46204

The Honorable Jamar K. Walker
U.S. District Court
Eastern District of Virginia
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a graduate of the George Washington University Law School and the term clerk for Judge Elizabeth F. Taviton on the Indiana Court of Appeals. I am applying to serve as your clerk for the August 2024 term. As a clerk, I offer extensive litigation and judicial experience, excellent writing and research skills, and a passion for public service. In addition, though I am barred in Indiana, I am a former resident of San Diego, and I will be sitting for the California Bar Exam in February 2023.

My litigation experience has prepared me to bring high-caliber assistance to your chambers. As an appellate clerk with federal judicial internship experience in a district court, I am adept at drafting opinions that demonstrate succinct writing, command of federal law and procedure, and require minimal editing and revision. My strength as a writer is further demonstrated by my performance in law school, where I wrote the top-scoring brief in the 2020 George Washington Law School First-Year Student Moot Court Competition and a well-received Note for the Journal of Energy and Environmental Law.

Further, I am committed to serving the public interest. In law school, I accrued over 500 hours of pro bono work. After clerking, I will apply for a litigating position with the Department of Justice Attorney General's Honors Program in the Environment and Natural Resources Division. I will bring that same passion for public service as a law clerk with your chambers.

Attached to this application are: my resume; my law school and undergraduate transcripts; a moot court brief for the Eleventh Circuit; and letters of recommendation from (1) Jeffrey Manns and Francis A. Gilligan, professors at the George Washington University Law School; (2) Jimmy S. McBirney, Senior Trial Counsel at the U.S. Department of Justice's National Courts Section; and (3) Ben Jernigan, who was my supervising clerk when I interned for Judge Rudolph Contreras on the D.C. District Court.

My clerkship and litigation experience, writing and research skills, and passion for public service make me a well-qualified candidate for a clerkship with your chambers. I appreciate your consideration, and I look forward to speaking with you further.

Respectfully,

Evan Brown

Evan Brown

Ebrown4@law.gwu.edu

Address:

402 N. Meridian St. #306
Indianapolis, IN 46204

EDUCATION

George Washington University Law School, Washington, DC (*Honors*)

J.D., May 2022, *Graduate with Honors*

GPA: 3.78, George Washington Scholar (Top 11%)

Activities: Moot Court Board, Journal of Energy and Environmental Law, GW Law Bands (electric bass)

Awards: Gold Presidential Service Award (500 pro bono hours)

Indiana University, Bloomington, IN (*Graduate with Highest Distinction*)

BS in Business, May 2019

GPA: 3.92, Kelley School of Business

Awards: Presidential Scholar, Hutton Honors Scholar, Provost Scholar

EXPERIENCE

Judge Elizabeth F. Tavitias, Indiana Court of Appeals, Indianapolis, IN

Law Clerk, September 2022 – September 2024

- Analyzes briefs on appeal and performs legal research to draft judicial opinions
- Proofreads and cite-checks co-clerks' drafts

Judge Rudolph Contreras, D.C. District Court, Washington, D.C.

Judicial Intern, January 2022 – April 2022

- Drafted two and a half opinions resolving motions to dismiss and motions to remand
- Supported clerks in drafting motions for summary judgment, motions in limine, and motions to suppress with supplemental research, cite-checking, and proofreading

U.S. EPA Office of Enforcement and Compliance Assurance

Law Clerk, January 2021 – April 2022; September 2021 – December 2021

- Drafted memorandum on the district courts' authority to issue nationwide injunctions for the Office of General Counsel
- Analyzed federal low-income housing and lead-based paint law to inform EPA's collaboration with HUD on environmental justice policy
- Researched Resource Conservation and Recovery Act's (RCRA's) universal waste storage requirements to draft memorandum in support of Notice of Violation

U.S. Department of Justice, National Courts Section, Washington, DC

Law Clerk, May 2021 – July 2021

- Drafted government motions for judgment on the administrative record, motions to dismiss, and bench memoranda in bid protests and contract disputes
- Researched Federal Rules of Evidence to support government's motion in limine and *Daubert* hearing before the Court of Federal Claims, leading to the exclusion of expert testimony

Professor Jeffrey Manns, Washington, DC

Research Assistant, May 2020– October 2020

- Researched cost-benefit analysis in federal rulemaking and drafted research report to inform law review

Brown Law Office, Indianapolis, IN

Law Clerk, May 2020– August 2020

- Researched Indiana Evidence Rules 602, 701, and 702 to draft motion in limine to exclude expert and lay testimony, resulting in settlement

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

Gwid : G33221649

Date of Birth: 02-NOV

Date Issued: 31-MAY-2022

Record of: Evan M Brown

Page: 1

Student Level: Law
Admit Term: Fall 2019Issued To: EVAN BROWN
EBROWN4@GWU.EDU

REFNUM:75047204

Current College(s): Law School
Current Major(s): LawDegree Awarded: J D 15-MAY-2022
With Honors

Major: Law

JD RANK: 63/549

SUBJ NO COURSE TITLE CRDT GRD PTS

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2019

Law School
Law

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
LAW 6202	Contracts Swaine	4.00	B+	
LAW 6206	Torts Suter	4.00	A	
LAW 6212	Civil Procedure Gutman	4.00	A-	
LAW 6216	Fundamentals Of Lawyering I Gullman	3.00	B-	
Ehrs	15.00 GPA-Hrs	15.00	GPA	3.467
CUM	15.00 GPA-Hrs	15.00	GPA	3.467

Spring 2020

Law School
Law

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
LAW 6208	Property Tuttle	4.00	CR	
LAW 6209	Legislation And Regulation Schaffner	3.00	CR	
LAW 6210	Criminal Law Weisburd	3.00	CR	
LAW 6214	Constitutional Law I Morrison	3.00	CR	
LAW 6217	Fundamentals Of Lawyering II Gullman	3.00	CR	
Ehrs	16.00 GPA-Hrs	0.00	GPA	0.000
CUM	31.00 GPA-Hrs	15.00	GPA	3.467

Good Standing

...
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO COURSE TITLE CRDT GRD PTS

Fall 2020

Law School
Law

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
LAW 6250	Corporations Cunningham	4.00	B+	
LAW 6400	Administrative Law Siegel	3.00	A-	
LAW 6434	Water Pollution Control Downing	2.00	A-	
LAW 6641	External Comp - Moot Court Johnson	1.00	CR	
LAW 6656	Independent Legal Writing	2.00	A+	
LAW 6657	Energy & Environ Law Jrnl Note	1.00	P	
LAW 6668	Field Placement	1.00	CR	
LAW 6670	Public Interest Lawyering Angel	2.00	B	
Ehrs	16.00 GPA-Hrs	13.00	GPA	3.564
CUM	47.00 GPA-Hrs	28.00	GPA	3.512

Good Standing

Spring 2021

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
LAW 6230	Evidence Braman	3.00	A	
LAW 6238	Remedies Transgrud	3.00	A	
LAW 6380	Constitutional Law II Colby	4.00	A	
LAW 6657	Energy & Environ Law Jrnl Note	1.00	P	
LAW 6667	Advanced Field Placement Brown	0.00	CR	
LAW 6668	Field Placement Tillipman	3.00	CR	
Ehrs	14.00 GPA-Hrs	10.00	GPA	4.000
CUM	61.00 GPA-Hrs	38.00	GPA	3.640

Good Standing

THURGOOD MARSHALL SCHOLAR

TOP 16% - 35% OF THE CLASS TO DATE

***** CONTINUED ON PAGE 2 *****

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University Registrar

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WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G33221649
Date of Birth: 02-NOV
Record of: Evan M Brown

Date Issued: 31-MAY-2022

Page: 2

SUBJ NO COURSE TITLE CRDT GRD PTS

Fall 2021

LAW 6218	Prof Responsibility & Ethics	2.00	A+
LAW 6240	Berger Litigation W/ Fed Govt.	2.00	A
LAW 6360	Axelrad Criminal Procedure	3.00	A
LAW 6431	Cheh Wildlife And Ecosystems	2.00	A
LAW 6652	Law Legal Drafting	2.00	A
LAW 6664	Grosko Lynh Jrnl	1.00	CR
LAW 6667	Energy/Environmental Law	0.00	CR
LAW 6668	Advanced Field Placement	2.00	CR
	Sulton		
	Field Placement		
	Mccooy		
Ehrs	14.00 GPA-Hrs	11.00 GPA	4.061
CUM	75.00 GPA-Hrs	49.00 GPA	3.735
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

Spring 2022

LAW 6232	Federal Courts	4.00	A-
LAW 6300	Federal Income Tax	3.00	A
LAW 6442	Control-Solid/Hazardous Waste	2.00	A
LAW 6640	Trial Advocacy	3.00	A+
LAW 6664	Jrnl	1.00	CR
LAW 6667	Energy/Environmental Law	0.00	CR
LAW 6668	Advanced Field Placement	2.00	CR
	Field Placement		
Ehrs	15.00 GPA-Hrs	12.00 GPA	3.972
CUM	90.00 GPA-Hrs	61.00 GPA	3.781

***** TRANSCRIPT TOTALS *****
Earned Hrs GPA Hrs Points GPA

TOTAL INSTITUTION	90.00	61.00	230.67	3.781
OVERALL	90.00	61.00	230.67	3.781

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INDIANA UNIVERSITY

OFFICE OF THE REGISTRAR

Official Transcript

Page 1 of 3

Name : Brown, Evan
 Student ID : 0003169951
 Address : 6214 Broadway St
 Indianapolis, IN 46220-1837
 United States

SSN : XXX-XX-8110
 Birthdate : 11-02-XXXX
 Print Date : 02-14-2020
 Request Nbr : 027094326

----- Degrees Awarded -----

Indiana University Degree
 Indiana University Bloomington
 Kelley School of Business
 Bachelor of Science in Business
 With Highest Distinction
 Hutton Honors College Program Completed
 Major: Marketing
 Minor: Psychology
 05-04-2019

Fall 2014 Bloomington

Program : University Div Ugrd Nondeg

Course	Title	Hrs	Grd
POLS-Y 103	INTRO TO AMERICAN POLITICS	3.00	A

 Semester: IU GPA Hours: 3.00 GPA Points: 12.000
 Hours Earned: 3.00 GPA: 4.000
 Cumulative: IU GPA Hours: 18.00 GPA Points: 72.000
 Hours Earned: 18.00 GPA: 4.000

Fall 2015 Bloomington

Program : Business Undergraduate

Course	Title	Hrs	Grd
BUS-K 204	THE COMPUTER IN BUS: HONORS	3.00	A
BUS-T 175	COMPASS I	1.50	A
BUS-X 170	HOW BUSINESS WORKS	3.00	A
MATH-M 118	FINITE MATHEMATICS	3.00	A
SPH-K 150	INTRO TO KINE AND PH	3.00	A

----- Beginning of Undergraduate Record -----

Fall 2012 Bloomington

Program : University Div Ugrd Nondeg

Course	Title	Hrs	Grd
CHEM-C 105	PRINCIPLES OF CHEMISTRY I	3.00	A
CHEM-C 125	EXPERIMENTAL CHEMISTRY I	2.00	A
HIST-H 105	AMERICAN HISTORY I	3.00	A

 Semester: IU GPA Hours: 8.00 GPA Points: 32.000
 Hours Earned: 8.00 GPA: 4.000
 Cumulative: IU GPA Hours: 8.00 GPA Points: 32.000
 Hours Earned: 8.00 GPA: 4.000

Spring 2013 Bloomington

Program : University Div Ugrd Nondeg

Course	Title	Hrs	Grd
HIST-H 106	AMERICAN HISTORY II	3.00	A

 Semester: IU GPA Hours: 3.00 GPA Points: 12.000
 Hours Earned: 3.00 GPA: 4.000
 Cumulative: IU GPA Hours: 11.00 GPA Points: 44.000
 Hours Earned: 11.00 GPA: 4.000

Fall 2013 Bloomington

Program : University Div Ugrd Nondeg

Course	Title	Hrs	Grd
MATH-M 211	CALCULUS I	4.00	A

 Semester: IU GPA Hours: 4.00 GPA Points: 16.000
 Hours Earned: 4.00 GPA: 4.000
 Cumulative: IU GPA Hours: 15.00 GPA Points: 60.000
 Hours Earned: 15.00 GPA: 4.000


--- Record continued in next column ---

Test Credit Applied Toward University Div Pre-Business Program Bloomington

Course	Title	Hrs	Grd
ENG-L 198	FRESHMAN LITERATURE	3.00	T
ENG-W 131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
ENG-W 131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
ENG-W 131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
ENG-W 131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
ENG-W 131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
HIST-H 103	EUROPE:RENAISSANCE TO NAPOLEON	3.00	T
HIST-H 104	EUROPE: NAPOLEON TO THE PRES	3.00	T
HIST-H 105	AMERICAN HISTORY I	3.00	T
HIST-H 106	AMERICAN HISTORY II	3.00	T
HIST-W 100	ISSUES IN WORLD HISTORY	3.00	T
MATH-M 199EX	MATH FUNDAMENTAL SKILL BY EXAM	0.00	T
MATH-M 199EX	MATH FUNDAMENTAL SKILL BY EXAM	0.00	T
MATH-M 211	CALCULUS I	4.00	T
MATH-M 211	CALCULUS I	4.00	T
MATH-M 212	CALCULUS II	4.00	T

--- Record continued on next page ---

Send To:
 Evan
 Evan Brown


 Mark McConahay
 Registrar

FOR RECIPIENT USE ONLY

INDIANA UNIVERSITY

OFFICE OF THE REGISTRAR

Official Transcript

Page 2 of 3

Name : Brown, Evan
 Student ID : 0003169951
 Address : 6214 Broadway St
 Indianapolis, IN 46220-1837
 United States

SSN : XXX-XX-8110
 Birthdate : 11-02-XXXX
 Print Date : 02-14-2020
 Request Nbr : 027094326

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 Test Credit Hrs: 33.00

Test Credit Applied Toward Business Undergraduate Program Bloomington

Course	Title	Hrs	Grd
BIOL-E 112	BASIC BIOL BY EXAMINATION II	3.00	T
BIOL-L 111	FNDTNS OF BIOL:DIVRS,EVOL,ECOL	4.00	T
BIOL-L 112	FNDTNS OF BIOL:BIOL MECHANISMS	4.00	T
CMLT-C 205	COMPARATIVE LITERARY ANALYSIS	4.00	T
ENG-W 131	READING, WRITING, & INQUIRY I	4.00	T
ENG-W 131	READING, WRITING, & INQUIRY I	3.00	T
GEOG-G 110	INTRO TO HUMAN GEOGRAPHY	3.00	T
HIST-H 103	EUROPE:RENAISSANCE TO NAPOLEON	4.00	T
HIST-H 104	EUROPE: NAPOLEON TO THE PRES	4.00	T
POLS-Y 103	INTRO TO AMERICAN POLITICS	3.00	T
Test Credit Hrs: 36.00			
Semester:	IU GPA Hours:	13.50	GPA Points: 54.000
	Hours Earned:	82.50	GPA: 4.000
Cumulative:	IU GPA Hours:	31.50	GPA Points: 126.000
	Hours Earned:	100.50	GPA: 4.000

Spring 2016 Bloomington

Program : Business Undergraduate	Course	Title	Hrs	Grd
BUS-C 104	BUSINESS PRESENTATIONS	3.00	A	
BUS-L 293	HONORS-LEGAL ENVIR OF BUS	3.00	A	
ECON-E 201	INTRO TO MICROECONOMICS	3.00	B	
STAT-S 301	BUSINESS STATISTICS	3.00	A	
BUS-D 270	GLOBAL BUS ENVIRONMENTS	1.50	A-	
BUS-A 100	BASIC ACCOUNTING SKILLS	1.00	A	
Semester:	IU GPA Hours:	14.50	GPA Points: 54.550	
	Hours Earned:	14.50	GPA: 3.762	
Cumulative:	IU GPA Hours:	46.00	GPA Points: 180.550	
	Hours Earned:	115.00	GPA: 3.925	

--- Record continued in next column ---

Fall 2016 Bloomington

Program : Business Undergraduate	Course	Title	Hrs	Grd
BUS-A 201	INTRO TO FINANCIAL ACCOUNTING	3.00	A	
BUS-C 205	BUSINESS COMMUNICATION-HONORS	3.00	A	
BUS-G 202	BUSINESS, GOVERNMENT, AND SOC	2.00	A+	
BUS-T 275	KELLEY COMPASS II: ASSOCIATE	1.50	A+	
HON-H 233	GRT AUTHORS, COMPSRS,&ARTISTS	3.00	A	
Course Topic(s): WALKING				
BUS-D 271	GLOBAL BUS ANLS-INTER BUS MGMT	1.50	B+	
Course Topic(s): PRIORITIZNG/ENHANC GLBL EXPANSN				
Semester:	IU GPA Hours:	14.00	GPA Points: 54.950	
	Hours Earned:	14.00	GPA: 3.925	
Cumulative:	IU GPA Hours:	60.00	GPA Points: 235.500	
	Hours Earned:	129.00	GPA: 3.925	

Spring 2017 Bloomington


Program : Business Undergraduate	Course	Title	Hrs	Grd
BUS-A 207	INTRO TO MANAGRL ACCT-HONORS	3.00	A-	
BUS-K 303	TECHNOLOGY & BUS ANALYSIS	3.00	A-	
ECON-E 202	INTRO TO MACROECONOMICS	3.00	A+	
HON-H 211	IDEAS AND EXPERIENCE I	3.00	A+	
HON-H 233	GRT AUTHORS, COMPSRS,&ARTISTS	3.00	A	
Course Topic(s): THE VIRTUE OF EMPATHY				
SPH-I 149	JUDO	1.00	A	
Semester:	IU GPA Hours:	16.00	GPA Points: 62.200	
	Hours Earned:	16.00	GPA: 3.888	
Cumulative:	IU GPA Hours:	76.00	GPA Points: 297.700	
	Hours Earned:	145.00	GPA: 3.917	

Fall 2017 Bloomington

Program : Business Undergraduate	Course	Title	Hrs	Grd
BUS-F 370	I-CORE - FINANCE COMPONENT	3.00	A	
BUS-M 370	I-CORE - MARKETING COMPONENT	3.00	A-	
BUS-P 370	I-CORE - OPERATIONS COMPONENT	3.00	A	
BUS-T 375	COMPASS III	1.00	A	
BUS-Z 370	I-CORE - LEADERSHIP COMPONENT	3.00	A-	
JSTU-X 170	LEADERSHIP IN JEWISH STUDIES	1.00	S	
Course Topic(s): JEWISH COOKING				
BUS-L 375	ETHICS & 21ST CENT BUS LEADER	2.00	A-	
Semester:	IU GPA Hours:	15.00	GPA Points: 57.600	
	Hours Earned:	16.00	GPA: 3.840	
Cumulative:	IU GPA Hours:	91.00	GPA Points: 355.300	
	Hours Earned:	161.00	GPA: 3.904	

--- Record continued on next page ---

Send To:
 Evan
 Evan Brown


 Mark McConahay
 Registrar

FOR RECIPIENT USE ONLY

INDIANA UNIVERSITY

OFFICE OF THE REGISTRAR

Official Transcript

Page 3 of 3

Name : Brown, Evan
 Student ID : 0003169951
 Address : 6214 Broadway St
 Indianapolis, IN 46220-1837
 United States

SSN : XXX-XX-8110
 Birthdate : 11-02-XXXX
 Print Date : 02-14-2020
 Request Nbr : 027094326

Spring 2018 Bloomington

Program	Course	Title	Hrs	Grd
Business Undergraduate	BUS-M 344	CREATIVITY AND COMMUNICATION	3.00	A
	BUS-M 346	ANALYSIS OF MARKETING DATA	3.00	A
	BUS-M 405	CONSUMER BEHAVIOR	3.00	A
	BUS-M 429	LEGAL ASPECTS OF MARKETING	3.00	A+
	PSY-P 155	INTRO TO PSY & BRAIN SCIENCES	3.00	A+

Semester: IU GPA Hours: 15.00 GPA Points: 60.000
 Hours Earned: 15.00 GPA: 4.000
 Cumulative: IU GPA Hours: 106.00 GPA Points: 415.300
 Hours Earned: 176.00 GPA: 3.918

Fall 2018 Bloomington

Program	Course	Title	Hrs	Grd
Business Undergraduate	BUS-J 375	STRATEGIC MANAGEMENT	3.00	A-
	BUS-M 303	MARKETING RESEARCH	3.00	A
	BUS-M 432	DIGITAL MARKETING	3.00	A
	PSY-P 304	SOC PSYCHOL INDIV DIFFERENCES	3.00	A
	PSY-P 323	INDUSTRIAL/ORGANIZATIONAL PSY	3.00	A

Semester: IU GPA Hours: 15.00 GPA Points: 59.100
 Hours Earned: 15.00 GPA: 3.940
 Cumulative: IU GPA Hours: 121.00 GPA Points: 474.400
 Hours Earned: 191.00 GPA: 3.921

Spring 2019 Bloomington

Program	Course	Title	Hrs	Grd
Business Undergraduate	BUS-M 450	MARKETING STRATEGY	3.00	A-
	SOC-S 100	INTRODUCTION TO SOCIOLOGY	3.00	A
	SPEA-E 476	ENVIRONMENTAL LAW & REGULATION	3.00	A+
	SPH-H 180	STRESS PREVENTION & MANAGEMENT	3.00	A

Semester: IU GPA Hours: 12.00 GPA Points: 47.100
 Hours Earned: 12.00 GPA: 3.925
 Cumulative: IU GPA Hours: 133.00 GPA Points: 521.500
 Hours Earned: 203.00 GPA: 3.921

Student Undergraduate Program Summary

GPA Hours: 133.00 Transfer/Test Hours Passed: 36.00
 Hours Earned: 170.00 Points: 521.500 GPA: 3.921

Indiana University Undergraduate Summary

IU GPA Hours: 133.00 Transfer/Test Hours Passed: 69.00
 Hours Earned: 203.00 Points: 521.500 GPA: 3.921

Academic Objective as of Last Enrollment

Business Undergraduate
 Marketing BSB

--- Record continued in next column ---

Psychology MIN


--- End Of Record ---

Issued at: Indiana University Bloomington
 Mark McConahay, Registrar

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Send To:
Evan
Evan Brown



Mark McConahay
Registrar

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INDIANA UNIVERSITY
OFFICE OF THE REGISTRAR
OFFICIAL TRANSCRIPT EXPLANATION

Note: The following explanation reflects information found on the Indiana University **Official Transcript** produced from the Student Information System implemented Fall 2004. A transcript labeled **Official Record** is also an official transcript which has been produced from the prior student record system. While there is no difference in the way grade point averages are calculated in each format, the Official Record (old system) will not reflect as many of the grade point average summaries as are now available on the Official Transcript (current system). *

I. **Grade and Credit Point System**

The following grades are considered in computing semester or cumulative grade averages. Plus and minus grades are computed in cumulative averages effective First Semester 1977-78. Course hours with a grade of "F" are counted when computing grade point averages but do not count toward the earned hours required for degrees.

A+ (4.0 Pts.)	B+ (3.3 Pts.)	C+ (2.3 Pts.)	D+ (1.3 Pts.)	WF	Withdrawn-Failing (0 Pts.)
A (4.0 Pts.)	B (3.0 Pts.)	C (2.0 Pts.)	D (1.0 Pts.)		(Discontinued First Semester 1977-78)
A- (3.7 Pts.)	B- (2.7 Pts.)	C- (1.7 Pts.)	D- (0.7 Pts.)	F	Failing (0 Pts.)

The following grades are not considered in computing semester or cumulative grade point averages:

AU Audit - No credit (Discontinued 1965)	O Denotes an Incomplete in a course taught through Purdue University.
AX through DX (Including plus and minus grades) Denotes a graded course subsequently retaken under the Extended-X Policy (effective Fall 1994) (See Undergraduate GPA exception below)	P Passed (Pass/Fail Option) (The Pass/Fail Option permits graduate and undergraduate students to enroll in a course and receive a grade of P or F. Pass/Fail Option courses are normally limited to electives. The responsibility of approval, as well as special regulations affecting the Option, rests with the dean of the student's school or division under procedures which the school or division establishes. Instructors are not notified of undergraduate students registering for this Option. A grade of P cannot subsequently be changed to a grade of A, B, C, or D)
CF Credited on Certificate (Discontinued 1965)	R Deferred (Effective First Semester 1977-78, used for course work which can be evaluated only after two or more semesters--such course work was previously graded with I.)
DF Deferred (Discontinued 1965; Treated as Incomplete)	S Satisfactory (entire class graded S or F)
E Conditional (Discontinued 1965; Treated as Incomplete)	T Denotes credits transferred from another institution.
EX Exemption (Discontinued 1965)	W Withdrawn--Passing (Prior to Second Semester 1974-75, used to indicate withdrawal while passing. Effective Second Semester 1974-75, used to reflect students who withdraw while passing after the official Drop and Add Period.)
FX Denotes a course originally failed and subsequently retaken during or after First Semester 1976-77 under the FX or Extended-X Policy. (See Undergraduate GPA exception below).	X Passed Without Grade (Discontinued 1965; Treated as Satisfactory)
I Incomplete (Effective First Semester 1977-78, automatically changed to F after one calendar year; See also grade of R)	
NC No Credit (Established 1971); replaced AUDIT (AU)	
NR No Report Submitted by Instructor (Used for unreported grades for prior semesters or course work that has not been graded for the current semester)	
NY Used to signify enrollment in a special program for which credit when earned will be shown as an ADDITIONAL entry on the permanent academic record.	

Repeated Courses

Repeated courses are counted in the IU grade point average (IU GPA) and may also be counted in the student's primary program GPA (Student Program GPA), depending on the policies of the student's program. Repeated courses do not count toward the earned hours required for degrees unless the course is defined as repeatable for credit. *

Undergraduate Grade Point Average (GPA) Exception

Courses that have been retaken under the conditions of the FX Policy or Extended-X (Retaken Course/GPA Exclusion) Policy are noted with an "X" following the grade. Under these policies, both enrollments in the course and their grades remain on the record, but the enrollment of the "X" graded course is excluded from the University credit hour totals and grade point average (Indiana University Summary). This "X" grade may or may not be excluded from the academic program credit hours and grade point average (Student Program Summary) depending upon the policy of the student's primary program. Not all Indiana University campuses honor the Extended-X Policy. *

II. **Record Format**

The "Official Transcript" standard format lists course history, grades and GPA information in chronological order sorted by the student's academic level. The "Official Transcript with Enrollment" provides the same information as the standard transcript but also includes all courses in which a student is currently enrolled. "Official Transcript" or "Official Transcript with Enrollment" (without an academic level designation) indicates that the document contains all work completed at Indiana University. A student may also request a transcript of only those courses taken at the undergraduate, graduate, or professional (Law, Medicine, Dentistry, Optometry) level. In these cases, the title of the document will reflect which academic level is represented. (Note: The graduate academic level may be subdivided into more than one "Graduate" grouping due to academic calendar differences.)

The **IU GPA** reflects the student's GPA according to standard university-wide rules. A Semester IU GPA and a cumulative-to-date IU GPA are calculated at the end of each semester. The overall IU GPA summary statistics are reflected at the end of each student career level.

The **Student Program GPA** is calculated according to the rules determined by the student's primary academic program at the time of printing. This GPA is subject to change whenever the student changes programs. The cumulative Student Program GPA summary statistics are reflected at the end of each student career level and are based on the student's last active primary program at that level.

III. **Transfer, Test, and Special Credit**

Courses accepted in transfer from other institutions are listed under a Transfer Credit heading. Generally, a grade of "T" (transfer grade) is assigned and course numbers, titles, and credit hours assigned reflect Indiana University equivalents. Transfer hours with a grade of "T" are not reflected in the cumulative grade averages. However, the hours are included in the "Hrs Earned" field.

A course suitable for credit which does not parallel an Indiana University course at the campus of evaluation may be designated by a course subject followed by "UN" (undistributed credit) and a number indicating an equivalent Indiana University course (class) level. For example, HIST-UN 200 represents a 200 (sophomore) level History course. Applicability of accepted transfer credit toward a particular degree is determined by the Indiana University school or division offering the degree program.

Credit awarded as a result of placement tests, credit by examination, or successful completion of a higher level course may be reflected as Special Credit with a transcript note or may appear as separately designated "Test or Special Credit." The total number of transfer and test hours on the record appears in a separate Transfer/Test Hours Passed category in the Student Program and Indiana University Summaries.

Note that there are exceptions to these general transfer credit policies related to transfer work from Purdue University campuses and Purdue State Wide Technology programs located on Indiana University campuses. For further details visit <http://registrar.indiana.edu/transcript.html>, Transfer Credit Exceptions.

IV. **Accreditation**

Indiana University, a member of the North Central Association, is accredited by the Higher Learning Commission (<http://www.ncahigherlearningcommission.org>) (312-263-0456). Accreditation covers all courses and programs offered at all campuses of Indiana University. See the appropriate school bulletins for other accreditations.

V. **Validation**

A transcript issued by Indiana University reflects course work completed at any campus: Bloomington, Columbus (IUPUC), Fort Wayne (IPFW), Gary (Northwest), Indianapolis (IUPUI), Kokomo, New Albany (Southeast), Richmond (East), South Bend. A transcript issued by Indiana University is official when it displays the Registrar's signature and the university's seal and is printed on Indiana University paper. The official university transcript is printed on SCRIP-SAFE paper and does not require a raised seal.

VI. **Registrar Contact**

Questions about the content of this record should be referred to the Office of the Registrar where it was printed.

IU Bloomington Office of the Registrar 408 N. Union Street Bloomington, IN 47405-3800 (812) 855-0121 http://registrar.indiana.edu Federal School Code: 001809	IPFW Fort Wayne Office of the Registrar 2101 E. Coliseum Boulevard Fort Wayne, IN 46805-1499 (260) 481-6100 http://www.ipfw.edu/registrar/ Federal School Code: 001828	IU Kokomo Office of the Registrar 2300 South Washington P.O. Box 9003 Kokomo, IN 46904-9003 (765) 455-9391 http://www.iuk.edu/~koregstr Federal School Code: 001814	IU South Bend Office of the Registrar Administration Building 148 1700 Mishawaka Avenue P.O. Box 7111 South Bend, IN 46634-7111 (574) 520-4451 http://registrar.iusb.edu Federal School Code: 001816
IU East Office of the Registrar 2325 Chester Boulevard Richmond, IN 47374-1289 (800) 959-3278 http://www.iue.edu/registrar/ Federal School Code: 001811	IUPUI Indianapolis Office of the Registrar Campus Center 250 420 University Boulevard Indianapolis, IN 46202-5144 (317) 274-1519 http://registrar.iupui.edu Federal School Code: 001813	IU Northwest Office of the Registrar Hawthorn Hall 109 3400 Broadway Gary, IN 46408-1197 (219) 980-6815 http://www.iun.edu/~regisnw/ Federal School Code: 001815	IU Southeast Office of the Registrar University Center South, 107 New Albany, IN 47150-6405 (812) 941-2240 http://www.ius.edu/registrar/ Federal School Code: 001817

* For a more detailed transcript explanation visit <http://registrar.indiana.edu/transcript.html>

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May 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to provide my enthusiastic recommendation of Evan Brown for a federal judicial clerkship position. In my capacity as a law clerk to Judge Rudolph Contreras of the United States District Court for the District of Columbia, I supervised Evan's work as an intern in Judge Contreras's chambers during the spring of 2022.

I am confident that Evan is qualified to serve as law clerk because, during his semester in Judge Contreras's chambers, he essentially performed the work of a law clerk: he drafted opinions resolving dispositive motions in pending cases. And he did it well. Evan demonstrated strong analytical skills, a quick grasp of complicated legal topics, and an ability to spot potentially important and difficult issues even when the parties had not neatly presented them. When Evan identified such an issue, he always came prepared, research in hand, with a proposed approach. As a result of his proactive analysis and organizational skills, Evan required minimal supervision as he drafted. These skills will only improve over the course of his upcoming clerkship for an Indiana appellate judge.

Writing and analysis skills aside, Evan was proactive and professional throughout his internship. Although our intern program was mostly remote due to COVID, he did a great job of meeting deadlines, keeping supervisors apprised of progress, and quickly responding to communications. He produced quality work product quickly; in addition to drafting two-and-a-half opinions over the course of a semester, he performed thorough cite checks of over 200 pages of opinions drafted by others.

Accordingly, I believe Evan is well qualified to discharge the duties of a law clerk, and I recommend him for such a position without reservation.

Sincerely,

Ben Jernigan

Ben Jernigan - John_Jernigan@dcd.uscourts.gov



U.S. Department of Justice
Civil Division
Tel.: (202) 307-2587
Jimmy.S.McBirney@usdoj.gov

Washington, DC 20530

June 10, 2022

VIA EMAIL

Re: Recommendation for Evan Brown

To Whom It May Concern:

I write in enthusiastic support of Evan Brown, who I had the pleasure of supervising during his time as a summer law clerk with the Department of Justice last summer. Mr. Brown was an exemplary intern who demonstrated an uncommon ability to quickly grasp complex issues and provide valuable insights and work product.

Mr. Brown worked on three major projects with me during his time in our office. On one project, I asked Mr. Brown to conduct research for a potential motion *in limine* to exclude two expert witnesses from testifying at trial in the Court of Federal Claims (COFC). Although there were no published COFC decisions excluding an expert witness under *Daubert*, Mr. Brown quickly identified relevant case law and provided clear and focused reasoning as to how it supported our motion. Mr. Brown's contributions played a major role in our ability to successfully exclude two expert witnesses from presenting their unsound opinions at trial.

Mr. Brown also wrote two excellent memos on other projects involving a motion to conduct a site visit and a niche area of damages. Mr. Brown asked the right questions, and his reasoning was logical, organized, and easy to follow. Mr. Brown was the rare intern who I was able to trust with significant projects that required minimal revision on my part.

Finally, Mr. Brown's work ethic was outstanding. Mr. Brown delivered excellent work product in a short amount of time, and his efficiency provided him opportunities to work on an unusually large number of projects. In addition to working on my cases, Mr. Brown worked on two bid protests with other attorneys in our office, including one in which he drafted substantial portions of a successful motion for judgement on the administrative record. Mr. Brown also worked on a motion to dismiss and a bench memo with other attorneys who also reported high satisfaction with his work product. Accordingly, I have great confidence in Mr. Brown's ability to excel in any clerkship, and in his other future legal endeavors.

Sincerely,

s/ Jimmy S. McBirney

Jimmy S. McBirney
Trial Attorney

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

May 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to strongly recommend Evan Brown for a clerkship in your chambers. Evan was a research assistant for me during the summer of 2020 and demonstrated a high level of research and writing skills that stood out from amongst his peers. His work on cost-benefit analysis was exceptionally thorough and thoughtful, and he repeatedly demonstrated the ability to exercise independent initiative and approach research questions in a creative way. Above all, he was dependable in meeting deadlines and producing quality work which is what every judge needs in a clerk.

I have no doubt that Evan would do an exceptional job as a law clerk, and I know this opportunity would equip him with invaluable skills and exposure for launching his legal career. Please call me at (202) 994-4645 or e-mail me at jmanns@law.gwu.edu if you have any questions about Evan.

Sincerely yours,

Jeffrey Manns
Professor of Law
George Washington University

Jeffrey Manns - jmanns@law.gwu.edu

**Office of Military Commission
Office of the Prosecution**

1600 Defense Pentagon
Room 3B652
Washington, DC 20301

Francis A. Gilligan
E-Mail: francis.a.gilligan.civ@mail.mil

Tel: (703) 534 4172

June 23, 2022

To Whom It May Concern:

I am writing this letter on behalf of Mr. Evan Brown, who is seeking to be an attorney in your office. Mr. Brown was one of my best students in the Trial Advocacy Course he took from me as part of the J.D. program at The George Washington University Law School. My characterization of Mr. Brown is based in part upon my experience teaching at the J.D. and LL.M. levels and in part on my experience as senior legal advisor to Chief Judge Susan J. Crawford of the U.S. Court of Appeals for the Armed Forces, as chief trial judge for the U.S. Army, and as the chief of the Criminal Law Division and chairman of the Joint Service Committee for the Office of the Judge Advocate General at the Department of the U.S. Army.

In teaching these courses, I use a number of actual cases which require the students to integrate evidence, civil procedure, criminal procedure, ethics, and substantive law as a true test of their ability to order and marshal the facts as an effective advocate. His background and education permitted him to digest arguments pro and con on many issues in these cases, which no doubt recur in today's court systems. Mr. Brown excelled in analyzing these issues.

Mr. Brown is an excellent thinker, speaker, and writer. I simply cannot imagine a better combination of diverse talent and legal experience to be an attorney in your office.

Sincerely,


Francis A. Gilligan

Evan Brown

Writing Sample

This writing sample discusses the issue of “recognized stature” and omits the issue of “work for hire” from the 2019 George Washington University Law School First-Year Student Moot Court Competition. It has only been edited by myself, and I have omitted citations to the record.

STATEMENT OF THE FACTS

Appellant Peach Tree Bank (“Peach Tree”) is a bank in Atlanta, Georgia. Appellee Fleur is an environmental activist and artist. On August 1, 2018, Fleur accepted Peach Tree’s offer to create artwork (“the work” or “Fleur’s work”) for display in Peach Tree’s branch lobby.

Peach Tree employed Fleur through the work’s completion on March 13, 2019. Fleur followed Peach Tree’s detailed instructions that the work be a 12-feet tall “triptych” that expresses an environmental theme through text on the side panels and contains imagery in the same style as Fleur’s previous works on the middle panel.

Fleur entitled the work *Eco Echo* to connote its environmental message. Fleur’s work cannot be moved without damage because Fleur chose to use “delicate” paint that is prone to “chipping.”

On November 17, 2018, Fleur was arrested for flying drones in restricted airspace above Heathrow Airport in a demonstration against pollution from the commercial airline industry. In making her point, Fleur created havoc in airports across the United States and Europe and endangered the lives of countless passengers.

Soon after Fleur’s demonstration, Fleur’s activist-fans began to ratchet up their own environmental demonstrations. In a social media post uploaded two days after Fleur’s airport demonstration, a fan “tags” the work next to an image of a semi-truck engulfed in flames and captions the post: “Protect the Earth. At any cost.” Less than one month later, hundreds of Fleur’s fans assembled around Peach Tree to stage protests that continue to this day. Fleur’s fans assault patrons on Peach Tree’s premises and create hazardous conditions by blocking exits and crowding the lobby to voice their demands. Peach Tree is not equipped to contain this chaos. Consequently, Peach Tree determined it needed to remove Fleur’s work from the lobby. Fleur

fears that removing her work will cause its “delicate” paint to chip and brought this action to enjoin Peach Tree under the Visual Artists Rights Act (“VARA” or “the Act”).

Fleur’s work has been the subject of critical review across the nation. The reviews skew negative. Dr. David Bloom, the Senior Curator of the Los Angeles Museum of Contemporary Art, describes the work as “ominous” and, aside from the center panel, “basically unremarkable at its core.” Rachel Mangus, a local Atlanta art critic, states that the artwork “disappoints” and suggests it has brought Fleur’s career “to an end.” At the preliminary injunction hearing, Peach Tree’s expert, Dr. Alan Rothschild, who holds a Ph.D. in Art History and Critical Art Theory, testified that the work was “garden variety corporate lobby art that in the long run will lose its popular cache and will not be recognized as anything approaching quality art.” Even Fleur’s expert, Professor Cynthia Katz, agrees that the work lacks critical acclaim; Professor Katz testified that Fleur’s work is not one that “the art community recognizes as significant” and could only speculate it might be “one day.” Fleur offered only two other examples of praise for the work. One is an advertisement in a Delta airline magazine. The other is an article written by Jayden Freeman, an art curator in Charlotte, North Carolina, who described Fleur’s work merely as “destination art . . . design[ed] for banks.”

ARGUMENT

The District Court erred in issuing a preliminary injunction because Fleur did not prove the four necessary elements for injunctive relief. A trial court may only issue a preliminary injunction when the moving party proves each of the following:

- (1) substantial likelihood of success on the merits;
- (2) irreparable injury will be suffered unless the injunction issues;
- (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and
- (4) if issued, the injunction would not be adverse to the public interest.

Brooks v. Barrett, No. 2:18-cv-565, 2018 WL 6004682, at *2 (11th Cir. Nov. 15, 2018) (citing *McDonald's Corp. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). The court “review[s] the grant of a preliminary injunction under the abuse-of-discretion standard.” *F.T.C. v. IAB Marketing Assocs., LP*, 746 F.3d 1228, 1232 (11th Cir. 2014) (citing *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1343 (11th Cir. 2008)). “A district court’s findings of fact will not be disturbed unless those findings are clearly erroneous.” *Id.* (citing *Wilshire Inv. Mgmt.*, 531 F.3d at 1343). “Legal conclusions are reviewed de novo.” *Id.* (citing *Wilshire Inv. Mgmt.*, 531 F.3d at 1343).

First, Fleur did not prove a substantial likelihood of success on the merits because the work’s lack of critical acclaim puts it outside of VARA’s ambit. *Second*, Fleur did not prove an irreparable injury because damage to the work is compensable in damages. *Third*, Fleur did not prove her alleged injury outweighs harm to Peach Tree because an injunction would expose Peach Tree to liability for injuries on its property and impair its business. *Finally*, granting the injunction would run against the public interest because the continued presence of the artwork endangers the public.

I. Fleur did not prove a likelihood of success on the merits because the work is not covered by VARA

Fleur’s work is not covered by VARA because VARA only protects artwork “of recognized stature.” 17 U.S.C. § 106A(a)(3)(B). This case presents an issue of first impression before this Court. Nonetheless, holdings from the other courts presented with this issue and the plain language of VARA itself unequivocally demonstrate that Fleur’s work lacks recognized stature. Therefore, Fleur cannot show a likelihood of success on the merits.

At minimum, artwork must generally be viewed as high-quality by experts to have recognized stature. *See Carter v. Helmsley-Spear*, 861 F. Supp. 303 (S.D.N.Y. 1994), *rev’d on*

other grounds, 71 F.3d 77 (2nd Cir. 1995). In the most cited case among VARA decisions, the court in *Carter* declared that artwork must be “viewed as meritorious” by “art experts, other members of the artistic community, or some cross-section of society” to have recognized stature. *Id.* at 325–26 (artwork had recognized stature when multiple experts praised its coherence, uniqueness, and conceptual imagination). The Seventh Circuit adopted the *Carter* test in *Martin v. City of Indianapolis*, where it found a steel sculpture had recognized stature based on local magazine articles, a letter from a local gallery director, and a letter to the editor of the local newspaper, all of which praised the sculpture. 192 F.3d 608, 612 (7th Cir. 1999).

Without expert support, popularity alone cannot establish that a work has recognized stature. *See Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2nd Cir. 2020). In finding popular aerosols were covered by VARA, the Second Circuit in *Castillo* did not end its analysis with the work’s popularity, but rather endorsed the *Carter* test in declaring, “[t]he most important component of stature will generally be artistic quality.” *Id.* at 166, 170. The court then reviewed expert testimony that established that the aerosols “reflect[ed] striking technical and artistic mastery.” *Id.* at 170.

Peach Tree’s position that VARA requires convincing expert testimony to establish that the artwork has recognized stature respects VARA’s textual limitations. Courts should reject standards that speculate on the work’s *potential* to achieve recognized stature because the text of VARA requires that the work’s recognized stature exist today; protected works must be “*of* recognized stature.” 17 U.S.C. § 106A(a)(3)(B) (emphasis added).

Peach Tree’s position also appropriately balances VARA’s purpose of preserving artwork with legitimate property interests. Congress went “to extreme lengths to very narrowly define the works of art that [are] covered.” H.R. Rep No. 101-514, at 6921 (1990). By setting the

standard too low, “courts risk alienating those . . . whose legitimate property interests are curtailed.” Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev 1935, 1968 (2000). The court in *Carter* observed this risk when it referred to recognized stature as a “gate-keeping mechanism.” 861 F. Supp. at 325. Fleur’s reading that VARA protects artworks with merely the *potential* to achieve recognized stature would render art owners “the perpetual curator of a piece of visual art that has lost (or perhaps never had) its luster.” *Martin*, 192 F.3d at 616 (Manion, J. dissenting in part).

Fleur’s work lacks recognized stature because art authorities do not generally view it as high-quality work. The *Castillo* court found aerosols had recognized stature based on expert testimony that the artwork “reflect[ed] striking technical and artistic mastery.” 950 F.3d at 166. Unlike the artwork in *Castillo*, the art community generally finds Fleur’s work to be of unexceptional quality. Dr. Rothschild testified that Fleur’s work was “garden variety.” Dr. Bloom criticized Fleur’s work as “basically unremarkable at its core.” Although Fleur’s expert personally enjoys Fleur’s work, she admitted the work is not currently one that “the art community recognizes as significant.” But that is exactly what the words “of recognized stature” require. 17 U.S.C. § 106A(a)(3)(B).

The only positive reviews in the record do not come close to counterbalancing the negative. The Delta magazine only uses Fleur’s work as a selling point to entice readers to “take advantage of Delta’s great fares to Atlanta” and is far from an art authority. Mr. Freeman’s article, meanwhile, cabins Fleur’s work as “destination art . . . design[ed] for banks.” For a curator of art, this is a far cry from high praise. Moreover, Mr. Freeman’s article says nothing about the work’s artistic merit.

Even under the least rigorous version of the *Carter* test, Fleur’s work would not qualify. Whereas the absence of expert testimony in *Martin* was counterbalanced by uniform praise in publications and letters, including those written by art authorities, 192 F.3d at 612, Fleur’s work’s reviews skew negative. The scant instances of praise for Fleur’s work come nowhere close to the overwhelming praise found in *Martin*. Fleur’s work, thus, lacks recognized stature.

The District Court erred in finding that the work’s popularity amongst Fleur’s own fans reflects the artistic quality necessary for VARA protection because, as described above, the art community generally finds Fleur’s work unremarkable. Fleur’s fan base cannot count as a “cross-section” of society under the *Carter* test. If that were the case, the *Castillo* court that reviewed popular aerosols would have had no need to consult the opinion of experts—the aerosols’ fanbase would have been sufficient. Moreover, there is little evidence that Fleur’s fans find the work “meritorious” for anything more than its underlying environmental message. *Cf. Carter*, 861 F. Supp. at 325–26 (artwork must “be viewed as meritorious”). The social media post from one of Fleur’s fans in the record—the only evidence of the views of Fleur’s fan base—is silent on the work’s quality. Fleur’s fans have assembled around the work not to admire its artistic merit, but to protest its corporate owner. In reality, Fleur’s work has only received widespread attention because of its popular environmental message.

It goes too far to protect works like Fleur’s that, although they express a popular message, might only “one day” be recognized as significant for their artistic merit. VARA requires that protected works be “*of* recognized stature” not be of *potential* recognized stature. 17 U.S.C. § 106A(a)(3)(B) (emphasis added). To protect works based on their potential would unduly suspend property owners like Peach Tree in uncertainty regarding rights to their own

artwork; would discourage collecting, commissioning, and sponsoring the very art VARA seeks to protect; and would go far beyond VARA's textual limitations.

To be protected under VARA, artwork must presently have recognized stature. Fleur's work does not. Therefore, the work is not protected by VARA, and Fleur cannot demonstrate a likelihood of success on the merits. The trial court, therefore, erred in granting a preliminary injunction.

* * * * *

Applicant Details

First Name **Ebba**
 Last Name **Brunnstrom**
 Citizenship Status **U. S. Citizen**
 Email Address ebbaslb@gmail.com
 Address

Address
Street
PO Box 210
City
Roxbury
State/Territory
Connecticut
Zip
06783
Country
United States

Contact Phone Number **4014898281**

Applicant Education

BA/BS From **Brown University**
 Date of BA/BS **May 2019**
 JD/LLB From **Columbia University School of Law**
<http://www.law.columbia.edu>
 Date of JD/LLB **May 15, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Columbia Human Rights Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **No**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Sturm, Susan
ssturm@law.columbia.edu
212-854-0062

Richman, Dan
drichm@law.columbia.edu
212-854-9370

Pozen, David
dpozen@law.columbia.edu
2128540438

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ebba Shinjin Lee Brunnstrom
508 West 112th Street, 7C
New York, NY 10027
(401) 489-8281

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

I am a rising third-year student at Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2024.

My two years of experience working as a paralegal in the Criminal Division of the U.S. Attorney's Office in New York make the prospect of starting my legal career clerking in your chambers particularly appealing. I really value your experience as an AUSA. I would also be thrilled to return to work in the D.C. area, where I have lived for two summer internships.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Richman (212-854-9370, drichm@law.columbia.edu); Pozen (212-854-0438, dpozen@law.columbia.edu), and Sturm (212-854-0062, ssturm@law.columbia.edu). Professor Seo (212-854-4779, sarah.seo@law.columbia.edu) has also agreed to act as an additional reference for me.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,



Ebba Shinjin Lee Brunnstrom

EBBA BRUNNSTROM

508 West 112th Street, 7C, New York, NY 10025
esb2166@columbia.edu • (401) 489-8281

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY

J.D. expected May 2024

Honors: Butler Fellow (merit scholarship)
Harlan Fiske Stone Scholar 1L Year, James Kent Scholar 2L Year

Activities: *Columbia Human Rights Law Review*, Notes Editor, 2L Staffer
Research Assistant to Professor David Pozen, 2022
Teaching Fellow to Professor Phillip Bobbitt, Legal Methods 2022 and 2023
Teaching Fellow to Professor Susan Sturm (Civil Procedure), Fall 2022
Teaching Fellow to Professor Sarah Seo (Criminal Law), Spring 2023
Criminal Justice Action Network, Pro Bono and Advocacy Chair

BROWN UNIVERSITY, Providence, RI

B.A., *magna cum laude* and with Honors, in Philosophy, received May 2019

Thesis: “*Time and Truth: Relative Truth-Assessment for the Growing Block Theory of Time*”

Activities: NCAA D1 Varsity Women’s Fencing Team, Captain and Starting Member
The Blognonian, Editor-in-Chief and Staff Writer
Introduction to Astronomy, Physics Department Undergraduate Teaching Assistant
The Brown Journal of Philosophy, Politics and Economics, Philosophy Section Editor

EXPERIENCE

SULLIVAN & CROMWELL, New York, NY

Summer Associate May 2023 – July 2023

DEPARTMENT OF JUSTICE, CRIMINAL APPELLATE SECTION, Washington, D.C.

Legal Intern May 2022 – July 2022

Researched and wrote four memoranda to the Solicitor General concerning whether she should approve an appeal, rehearing, or certiorari in criminal cases where there was a ruling adverse to the United States. Helped Appellate Section Attorneys research issues for briefs, certiorari petitions and current issues facing the department. Drafted facts and argument section of a brief to be submitted to the Sixth Circuit Court of Appeals.

U.S. ATTORNEY’S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, New York, NY

Paralegal Specialist, Criminal Division July 2019 – August 2021

Managed federal criminal cases from the investigation to the trial stage, working directly with Assistant U.S. Attorneys in the Narcotics Unit. Assisted in drafting legal documents including subpoenas, motions, and discovery letters. Presented exhibits in federal trial court.

Summer Undergraduate Intern – Press Office June 2018 – August 2018

Assisted in composing press releases and quotes. Performed paralegal duties for the Public Corruption Unit. Received competitive Brown University LINK Award for summer internships.

PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, Washington, D.C.

Criminal Law Internship Program – Investigative Intern June 2017 – August 2017

Worked on highest-level felony cases, including two homicides, as a member of a four-person team.

TELEGRAPH MEDIA GROUP, THE TELEGRAPH NEWSPAPER, London, UK

News Desk Intern June 2016 – August 2016

Published seven general news articles in the internationally renowned newspaper *The Telegraph*.



Registration Services

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CLS TRANSCRIPT (Unofficial)

06/07/2023 10:06:05

Program: Juris Doctor

Ebba Brunnstrom

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6407-1	Advanced Constitutional Law: 1st Amendment	Healy, Thomas Joseph	3.0	A-
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	B+
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A-
L6683-1	Supervised Research Paper	Sanger, Carol	2.0	A
L6822-1	Teaching Fellows	Seo, Sarah A.	3.0	CR

Total Registered Points: 15.0**Total Earned Points: 15.0**

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A-
L6241-1	Evidence	Shechtman, Paul	3.0	A
L6675-1	Major Writing Credit	Sanger, Carol	0.0	CR
L8951-1	S. Cybersecurity, Data Privacy and Surveillance Law [Minor Writing Credit - Earned]	Richman, Daniel; Tannenbaum, Andrew; Waxman, Matthew C.	2.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Pozen, David	2.0	A
L6683-1	Supervised Research Paper	Sanger, Carol	1.0	A-
L6822-1	Teaching Fellows	Bobbitt, Philip C.	1.0	CR
L6822-2	Teaching Fellows	Sturm, Susan P.	4.0	CR

Total Registered Points: 16.0**Total Earned Points: 16.0**

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-2	Criminal Law	Seo, Sarah A.	3.0	A-
L6679-1	Foundation Year Moot Court		0.0	CR
L6121-30	Legal Practice Workshop II	Yen, Marianne	1.0	HP
L6116-2	Property	Purdy, Jedediah S.	4.0	A-
L6183-1	The United States and the International Legal System	Waxman, Matthew C.	3.0	A-
L6118-1	Torts	Huang, Bert	4.0	A-

Total Registered Points: 15.0**Total Earned Points: 15.0****January 2022**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-8	Legal Methods II: Impeachment	Bobbitt, Philip C.	1.0	CR

Total Registered Points: 1.0**Total Earned Points: 1.0****Fall 2021**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Sturm, Susan P.	4.0	A
L6133-6	Constitutional Law	Pozen, David	4.0	B+
L6105-8	Contracts	Kraus, Jody	4.0	A-
L6113-3	Legal Methods	Harcourt, Bernard E.	1.0	CR
L6115-30	Legal Practice Workshop I	Izumo, Alice; Yen, Marianne	2.0	P

Total Registered Points: 15.0**Total Earned Points: 15.0****Total Registered JD Program Points: 62.0****Total Earned JD Program Points: 62.0****Honors and Prizes**

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0

12/10/2020

Display Internal Academic Record

INTERNAL ACADEMIC RECORD FOR:

Ebba Shinjin Lee Brunnstrom (Id: B01023254)

NOT FOR TRANSCRIPT PURPOSES

NOTE: Grade of S* indicates a mandatory S/NC course

NOTE: The (✓) adjacent to the course title indicates a writing deficiency indicator

Fall 2015: Admitted as a Degree Candidate: The College

Term: Fall 2015 **Academic Standing:** Good Standing **Workload Status:** Full Time
Level: Undergraduate **Classification:** Semester Level 01

Course Code	Course Title	Grade Mode	Grade	Credit
CLAS 1120G S01	The Idea of Self	G	A	1.00
COLT 0710Q S01	Odysseus in Literature	G	A	1.00
PHYS 0070 S01	Analytical Mechanics	G	C	1.00
Course Credits Earned:	Semester	3.000	Cumulative	3.000
Enrollment Units:	Semester	4.000	Cumulative	4.000

Term: Spring 2016 **Academic Standing:** Good Standing **Workload Status:** Full Time
Level: Undergraduate **Classification:** Semester Level 02

Course Code	Course Title	Grade Mode	Grade	Credit
ECON 0110 S01	Principles of Economics	G	A	1.00
GEOL 0810 S01	Planetary Geology	G	A	1.00
LITR 1010B S01	Advanced Poetry	S	S*	1.00
PHIL 1620 S01	Philosophy of Quantum Mechancs	G	A	1.00
Course Credits Earned:	Semester	4.000	Cumulative	7.000
Enrollment Units:	Semester	4.000	Cumulative	8.000

Term: Fall 2016 **Academic Standing:** Good Standing **Workload Status:** Full Time
Level: Undergraduate **Classification:** Semester Level 03

Course Code	Course Title	Grade Mode	Grade	Credit
ENGL 0100V S01	Inventing Asian Am Lit	G	A	1.00
MATH 0170 S01	Advanced Placement Calculus	S	S	1.00
PHIL 0540 S01	Logic	G	A	1.00
PHIL 1590 S01	Philosophy of Science	G	A	1.00
PHYS 0270 S01	Introduction to Astronomy	G	A	1.00
Course Credits Earned:	Semester	5.000	Cumulative	12.000
Enrollment Units:	Semester	4.000	Cumulative	12.000

Term: Spring 2017 **Academic Standing:** Good Standing **Workload Status:** Full Time
Level: Undergraduate **Classification:** Semester Level 04

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12/10/2020

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Course Code	Course Title	Grade Mode	Grade	Credit
CLPS 0010 S01	Elmntry Psych:Intro-Mind/Behav	G	A	1.00
ENGL 0930 S05	Intro to Creative Nonfiction	S	S*	1.00
PHIL 1660 S01	Metaphysics	G	A	1.00
POLS 0110 S01	Intro to Political Thought	G	A	1.00
Course Credits Earned:	Semester	4.000	Cumulative	16.000
Enrollment Units:	Semester	4.000	Cumulative	16.000

Term: Fall 2017 **Academic Standing:** Good Standing **Workload Status:** Full Time
Level: Undergraduate **Classification:** Semester Level 05

Course Code	Course Title	Grade Mode	Grade	Credit
ENGL 0100P S01	Love Stories	G	A	1.00
ENGL 1180P S01	Further Adven Creatv Nonfictn	S	S*	1.00
PHIL 0990T S01	Paradox and Infinity	G	A	1.00
PHYS 0100 S01	Nature/Meaning Sci Explanation	G	A	1.00
Course Credits Earned:	Semester	4.000	Cumulative	20.000
Enrollment Units:	Semester	4.000	Cumulative	20.000

Term: Spring 2018 **Academic Standing:** Good Standing **Workload Status:** Full Time
Level: Undergraduate **Classification:** Semester Level 06

Course Code	Course Title	Grade Mode	Grade	Credit
ENGL 1180K S01	The Art of Literary Nonfiction	S	S*	1.00
HIST 0150G S01	History of Law: Great Trials	G	A	1.00
PHIL 0360 S01	Early Modern Philosophy	G	A	1.00
PHIL 0990X S01	Conditionals	G	A	1.00
Course Credits Earned:	Semester	4.000	Cumulative	24.000
Enrollment Units:	Semester	4.000	Cumulative	24.000

Term: Fall 2018 **Academic Standing:** Good Standing **Workload Status:** Full Time
Level: Undergraduate **Classification:** Semester Level 07

Course Code	Course Title	Grade Mode	Grade	Credit
CSCI 1805 S01	Computers, Freedom and Privacy	G	A	1.00
PHIL 0350 S01	Ancient Philosophy	G	A	1.00
PHIL 1750 S01	Epistemology	G	A	1.00
PHIL 1995 S15	Senior Thesis	G	A	1.00
Course Credits Earned:	Semester	4.000	Cumulative	28.000
Enrollment Units:	Semester	4.000	Cumulative	28.000

Term: Spring 2019 **Academic Standing:** Good Standing **Workload Status:** Full Time
Level: Undergraduate **Classification:** Semester Level 08

https://selfservice.brown.edu/ss/swp_internal_acad_record.p_Stud_IAR

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12/10/2020

Display Internal Academic Record

Course Code	Course Title	Grade Mode	Grade	Credit	
ENGL 0200F S01	How We Became Machines	G	A	1.00	
LITR 1151Q S01	Great Adventure	G	A	1.00	
PHIL 1600 S01	Philosophy of Law	G	A	1.00	
PHIL 1995 S15	Senior Thesis	G	A	1.00	
Course Credits Earned:		Semester	4.000	Cumulative	32.000
Enrollment Units:		Semester	4.000	Cumulative	32.000

Degree Awarded
 Bachelor of Arts
 Magna Cum Laude
 May 26, 2019
 AB - Philosophy - Honors

Writing Requirement:
 Writing Requirement One - Satisfied 12/22/15
 Writing Requirement Two - Satisfied 12/19/17

End of Academic Record

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Ebba Brunnstrom for a position as your law clerk. Ebba was a student in my Civil Procedure class in the Fall of 2021, and then served as a teaching assistant for Civil Procedure the following year. Ebba's strengths as a rigorous thinker, resourceful researcher, and excellent writer, along with her initiative and follow-through.

I was aware of Ebba's mastery of the material based on her excellent performance whenever called upon to discuss a case in class. Her responses demonstrated that she was consistently well prepared, that she understood the cases, and had an extremely logical mind that enabled her to make sense of complexity without oversimplifying. Seeing her quiet strength, I was excited when Ebba received an A on the civil procedure final exam. She was also highly recommended by her teaching assistant to become a teaching assistant the following Fall.

When I offered the position to Ebba, I had my first genuine opportunity to interact in a more sustained way with her. I saw her powerful mind at work, alongside the humility and willingness to learn that I would come to expect from Ebba. We had a rare conversation in which Ebba really probed what being a successful teaching assistant entailed and what made me believe that she was qualified for that position. We talked through specific examples from her exam and her in-class performance, connecting the capabilities they demonstrated to the role that Ebba would have a chance to play as a TA. Only after she saw that she had demonstrated the skills needed to serve as a TA at a high level of performance did Ebba accept the position.

Ebba's performance as a TA was terrific, right from the beginning. She took the initiative to reach out to students from the class to get their perspectives on what worked well in sections and what could be improved. She also gathered the materials used by TAs in the previous year, along with helpful visual and analytical presentations by classmates, so that they could inform the design of sessions for the coming year. Her feedback about my classroom presentations, an important part of the job, was consistently astute, thoughtful, and concretely useful. They revealed her insight, her willingness to speak her mind, and the humility and empathy that made her so effective in communicating both affirmation and constructive criticism. She provided similar kinds of feedback to the other TAs, becoming a valued partner in revising the weekly problems and providing thoughtful comments on their pedagogical choices. She also pulled together a set of slides for the TA sections on personal jurisdiction and joinder, building on prior presentations. The slides were so strong that we decided to use them in each of the TA sections. The combination of Ebba's humility, organizational skill, and rigor was evident in these presentations, as well as in the problems that she developed for use in section. She was able to reconstruct her learning process, remembering how someone unfamiliar, for example, with personal jurisdiction doctrine might go wrong in their analysis, and then to offer modes of presenting the material that would help other people's mastery.

Ebba thrives on intense preparation, opportunities for a mental challenge, and strong working relationships, all of which were on display in her role as a TA. She shared those skills generously with her section, providing unwavering support for her students and consistently insightful and comprehensive feedback on their written work. At the end of the semester, she became my thought partner in brainstorming ideas for the final exam, providing straightforward and extremely insightful responses that were invaluable in helping me develop a challenging but fair exam.

Ebba has come to her passion for law through the portal first of science and math, discovering that her logical mind drew her to philosophy, and her thirst for social justice and real world impact led her to connect that philosophical bent to law. She is genuinely interested in forging a legal career that enables her to make the greatest possible impact, be part of a team, and work in an environment where justice matters. She also would love to be able to apply her research and writing skills, and to see judicial decision making up close. Her interest in clerking flows from this combination of capabilities and interests.

Finally, Ebba is wonderful to work with—kind, empathetic, humble, generous, and reliable. I have no doubt that she will make an excellent law clerk, and I highly recommend her.

Sincerely,

Susan Sturm

Susan Sturm - ssturm@law.columbia.edu - 212-854-0062

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Ebba Brunnstrom

Dear Judge Walker:

I write to enthusiastically support the application of Ebba Brunnstrom, a Columbia Law School rising 3L (Class of 2024), to be your law clerk. Although her grades, though quite good, are a little short of stratospheric, I think – based on my extensive interaction with Ebba and her writing projects – that she is one of the top candidates in her class. She really is spectacular.

Although I don't teach 1L courses, I met Ebba at the start of her 1L year. Because of her strong commitment to public interest work – reflected in her year as an intern homicide investigator for the DC Public Defender Service and her three years as a paralegal in the Criminal Division of the SDNY USAO -- she had been selected as a Public Interest/Public Service Fellow, and I was lucky enough to be assigned to be her mentor. We had some great conversations about course selection and her career plans, and I was deeply struck by her no-nonsense manner and deep intelligence.

I got to know Ebba's work far better in her 2L year, when she took my Criminal Adjudication course and the seminar on Cybersecurity, Data Privacy, and Surveillance Law that I teach with my colleagues Matt Waxman and Andrew Tannenbaum. In addition, although I am not Ebba's formal advisor for the Note she was writing for the Columbia Human Rights Law Review on the extent to which the Comstock Laws – creating federal offenses for the distribution of materials “designed, adapted, or intended for producing abortion” – could be used to prosecute (or to sue under civil RICO) in the wake of *Dobbs v. Jackson Women's Health Organization* (2022), I am playing a substantial back-up role.

Ebba was a flat-out outstanding participant in the cyber seminar. Perhaps because of her work on both sides of criminal cases, she brought a lovely sense of balance to the sundry issues we explored – digital evidence collection; the regulation of spyware, and cybersecurity liability, to name a few – combined with an analytic acuity and careful expression that gave her classroom contributions particular weight.

Ebba also wrote an extraordinary final paper on a topic that highlighted her enormous intellectual range. In late 2022, Apple pulled back from its plan to use on-device hash-value matching to scan a user's iCloud account for known child sexual abuse material (CSAM) images. Notwithstanding the criticism from privacy advocates, Ebba explained how Apple's proposed method of scanning for CSAM, would have survived Fourth Amendment scrutiny as a voluntary private search, even where Apple sent scanned files to the National Center for Missing & Exploited Children's Cyber Tipline, for use in possible prosecutions. The new complication, Ebba showed, was that legislation proposed by the European Commission in late 2022 would oblige Apple to do the very scanning it had decided not to do. This raised the question whether scanning that Apple would now be legally required to do, albeit by a foreign government, could be considered “private” for Fourth Amendment purposes. Ebba really got to show her stuff in this piece: fully engaging with the technical details of hash-value scanning; the institutional structure of CSAM enforcement in the US; the “joint coercion” and other Fourth Amendment doctrines, and the interaction of EU and US law. This is someone with a taste for really complex legal problems, and a talent for carefully teasing out the component parts and showing their analytical interaction.

Ebba's intellectual range and ability to dive into, and quickly master, a complex and dynamic legal environment was further displayed in her Note. Long before most of her classmates had even started to think about their Note topics, Ebba decided – based, in part on her work in the Criminal Appellate Section at Main Justice over the summer, and way before just about any scholar had focused on the issue – to determine the current status of the Comstock Laws in the wake of *Dobbs*. Ebba worked through the legislative history and sparse caselaw relating to these statutes, and, long before the Office of Legal Counsel had tackled the issue, had teased out a doctrinally legible understanding of how these massively underspecified prohibitions worked in a landscape of state law variation. The OLC memo has hardly preempted Ebba, as she has gone on to make a powerful void-for-vagueness argument that is an important contribution to current debates.

Ebba's massive intellectual range is matched by her writing ability. She writes fluidly and extremely clearly, without fanfare and to powerful effect. She also responds with grace and speed to criticism. I've long thought that journalism experience is great preparation for clerking (and law school for that matter), since the ability to compose clearly under pressure is such an asset. So I wasn't surprised to see that Ebba spent a summer, just out of high school, writing articles for *The Telegraph* (UK) newspaper.

Ebba's range is not limited to law. She came into Brown as an astrophysics major, having been a runner-up in the UK Young Scientist of the Year competition when she went to school there. Although she soon shifted to philosophy, and caught the law-school bug, she remains interested in the intersection of law and science. And, though she never mentioned it to me, I think Ebba's star turn as captain and starting member of the Brown fencing team shows precisely the discipline and commitment that I

Dan Richman - drichm@law.columbia.edu - 212-854-9370

see in her law school work.

Ebba strikes me as a well-grounded, mature person, of extraordinary competence. She also seems like she'd be a pleasure to have in chambers – low-key and straightforward, with a terrific sense of humor. I am confident she would be an excellent law clerk. If there is anything else I can add, please give me a call.

Respectfully yours,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Ebba Brunnstrom

Dear Judge Walker:

It is my pleasure to recommend Columbia Law School rising 3L Ebba Brunnstrom for a clerkship in your chambers. Ebba is one of the stars of the class of 2024 and will be a fantastic clerk.

I first met Ebba, who was lured away from other law schools by a merit scholarship, when she was one of 40 students assigned to my Constitutional Law “small group” in the fall of 2021. It was clear that Ebba was immaculately prepared for every class, and each time I called on her, she gave a crisp and insightful response. But she didn’t volunteer very much, so when her final exam fell just short of an A-, I thought it was unfortunate but didn’t bump the grade up (and another student’s grade down), instead resolving to keep an eye out for a student on the shy side who had great promise.

Thankfully, Ebba soon followed up with me to learn more about a book-in-progress I had mentioned during class, on the constitutional history of the war on drugs. Ebba had been a paralegal in the U.S. Attorney’s Office for the Southern District of New York before law school, as well as an intern in the D.C. Public Defender’s Office during college, and she has a strong interest in criminal law. During that first conversation on the book, Ebba asked such probing questions about Eighth Amendment challenges to drug sentences that I took the rare step of offering her a Research Assistant position while she was still a 1L. Ebba accepted, and starting that spring and continuing into this past academic year, she has been one of my main RAs.

Ebba has been superb in this role. I have given her a diverse array of assignments, from tracing the evolution of the American Bar Association’s stance on drug policy over time, to reconstructing political responses to the revelation that Supreme Court nominee Douglas Ginsburg had smoked pot while a law professor, to tracking down amicus briefs submitted to state supreme courts in drug cases from the 1970s, to finding every law review article and judicial opinion since 1960 that has advanced any version of a Cruel and Unusual Punishment Clause argument against long sentences for nonviolent drug offenses. On all of these assignments, Ebba has been a rock—dependable, thorough, timely, accurate. She has been the model of a hyper-diligent, hyper-competent RA.

Ironically, it was in my Constitutional Law class that Ebba had her least successful experience at Columbia, as she has received A-range grades otherwise and starred in numerous settings. Indeed, Ebba has developed such a strong reputation for professionalism and dependability that no fewer than three professors have employed her as a Teaching Fellow—something that is almost unheard of here. Ebba has been a leader of the student group devoted to criminal justice issues. And she has written an impressive note, scheduled for publication next year, that offers a new take on the much-discussed issue of whether the mailing of abortion drugs is prohibited by the Comstock Act. Against the position of both Republican state attorneys general and the Biden administration’s Office of Legal Counsel, Ebba argues that the Comstock Act is void for vagueness.

If Ebba initially struck me as shy, I now see her as a quiet but confident force of nature. Having lived abroad for much of her life and worked in a variety of criminal justice jobs, it takes a lot to faze Ebba. Her tenacity and work ethic were strengthened further by being a Division 1 fencer in college (for the details, see <https://brownbears.com/sports/fencing/roster/ebba-brunnstrom/9256>). And as her successes in multiple Teaching Fellow positions reflect, Ebba has become not just a widely respected figure but a widely recognized leader of the student body. Perhaps owing to her background in philosophy and science—Ebba was a runner-up for the UK Young Scientist of the Year award while in high school in London and majored in philosophy at Brown—she just takes care to be precise and informed when she speaks.

In short, Ebba is a person of great substance, smarts, and ability. She has distinguished herself in criminal law subjects more than any other student in the class. Her work ethic is exemplary. And she has proven to me time and again that her legal research skills are first-rate. I have no reservations about Ebba, only admiration, and I have no doubt that she will continue to do first-rate work as a clerk. Any judge would be lucky to hire her.

If I can be of any further assistance, please do not hesitate to contact me.

Respectfully,

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CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is an excerpt of the last two sections of my Note, 'Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post-Dobbs.' This Note was advised by Professor Carol Sanger. I also received some high-level feedback from Professor Dan Richman and a student editor from the *Columbia Human Rights Law Review*. This Note has been selected for publication in the *Columbia Human Rights Law Review* in fall 2023.

The Comstock Act Laws prohibit the mailing and importation of any abortion-related material within the United States. Whatever protection there was against the application of these laws by the government and private individuals from the constitutional right to an abortion was overturned by *Dobbs v. Jackson Women's Health Organization*, 597 U.S. __ (2022). Recent trends from the last year show that Republican lawmakers are eager to start enforcing the Comstock Act mailing prohibitions. Pushback from this administration's Office of Legal Counsel (the "OLC") suggests that a limiting construction should be read into the Comstock Act Laws so that the prohibition on mailing would apply only to "illegal abortions." The first two sections of this Note give an overview of the caselaw, legislative history, and long period of non-enforcement surrounding these statutes. In these latter two sections, the Note engages with criticism of the OLC's interpretation and ultimately concludes that the Comstock Act Laws are unconstitutionally vague.

III. DEFINING AN ‘ILLEGAL ABORTION’

Although the word “illegal” does not appear in the text of the statutes, the case law on 18 U.S.C. §§ 1461 and 1462¹ requires that the government prove the defendant had the intent that the articles they sent in the mail be used unlawfully—in other words, for an “illegal abortion.”² This limiting construction has been uniformly applied by federal courts in the limited number of cases that were brought under the provision of the statute that prohibited the mailing of contraception-related articles.³ It was even accepted by the USPS and brought to the attention of Congress.⁴

Whether the definition of an “illegal abortion” under this construction should take on a meaning local to the state in which the sender directs the mail—as suggested by the OLC in a December 2022 Opinion—is another matter. In this Section, this Note explores arguments for and against adopting this “local” narrowing construction of the Comstock Act laws.

¹ 18 U.S.C. § 1461, Mailing Obscene or Crime-Inciting Matter; 18 U.S.C. § 1462, Importation or Transportation of Obscene Matters. Originating in the Comstock Act, Comstock Act, ch. 258, 17 Stat. 598 (1873) (“An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use”).

² The OLC determined that 18 U.S.C. § 1461 does not prohibit the mailing, delivery or receipt by mail of mifepristone and misoprostol where the sender “lacks the intent that the recipient of the drugs will use them unlawfully.” Their conclusion is predicated on the determination that federal judges interpreting § 1461 read a reasonability exception into the law. Therefore, the applicability of the Comstock Act laws is limited to cases where the government can show that the defendant had the intent that the articles be used “for *illegal* contraception or abortion.” Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. ____ (Dec. 23, 2022) <https://www.justice.gov/olc/opinion/file/1560596/download> [hereinafter *OLC Opinion*].

³ *Youngs Rubber Corp. v. C.I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930); *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933); *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938). See Part I(C) for a discussion of the relevant case law and note 79 for an overview of the consensus of the limiting construction as applied to the contraception-related provision of the Comstock Act laws.

⁴ *OLC Opinion supra* note 9 at 17-20.

A. In Defense of the OLC's Local Construction

The OLC adopts what this Note will call the “local” interpretation of the Comstock Law. Under the local construction, the intent to produce an “unlawful” abortion cannot be inferred from delivery of abortion pills into a state with restrictive abortion laws, since the pills likely have some lawful uses under state-specific law. So, the OLC concludes that the criminal intent of the seller should be evaluated in relation to the specific abortion law in place in the state in which the non-mailable material is sent.

This position is most defensible if one sees *Youngs Rubber Co.* as instructive in interpreting § 1461. In *Youngs Rubber Co.*, the court looked to local laws to conclude that the contraceptives at issue were mailed for a legitimate use. The court stated that since “[t]here is no federal statute forbidding the manufacture or sale of contraceptives[, t]he articles which the plaintiff sells may be used for either legal or illegal purposes.” In particular, the *Youngs Rubber Co.* panel pointed to preventing disease and preventing conception in instances “where that is not forbidden by local law” as examples of legitimate uses of the contraceptives.⁵ The court went on to conclude: “By the local law of New York, such articles are not absolutely prohibited. Section 1145 of the Penal Law authorizes the supplying of them to lawfully practicing physicians, or by their direction.”⁶

The approach adopted by *Youngs Rubber Co.* and the OLC suggests that unless a state outright banned the use of abortion medication for any purposes, unlawful intent could not be inferred. This reading would mean federal law would be applied differently from state to state. However, that would not be that unusual. For example, the current federal gambling regime

⁵ *Youngs Rubber Corp.* 45 F.2d at 107 (describing “promot[ing] illicit sexual intercourse” as an example of contraceptive use that would be forbidden by local law).

⁶ *Id.* at 107.

penalizes “illegal” gambling businesses, where the definition of “illegal” depends on state laws that vary from state to state.⁷

Rev. Stat. §§ 3893 and 3894, the codification of the Comstock Act in 1873,⁸ originally provided penalties for mailing obscene books (and articles or things designed for the prevention of conception or the procuring of abortion) and prohibited letters and circulars concerning *illegal* lotteries from passing through the mails.⁹ The original form of the law was understood to allow for the mailing of legal lotteries, meaning that it did not bar states with legal lotteries from mailing lottery circulars within that state.¹⁰ This shows that when the word “illegal” appeared in a federal statute relating to the mailing of lotteries, the general consensus was to adopt a state law-specific construction of the word. This is strongly supported by a House Report of the Subcommittee on Criminal Justice from 1978, which proposed modifying § 1461 to require “proof that the offender aided in the mailing of a means of procuring an illegal abortion,”

⁷ See e.g. 18 U.S.C. § 1955, Prohibition of illegal gambling businesses (stating that “[a]s used in this section ‘illegal gambling business’ means a gambling business which . . . is a violation of the law of a State or political subdivision in which it is conducted . . .”). See also 18 U.S.C. § 1952, The Interstate and Foreign Travel or Transportation in Aid of Racketeering Act (making it unlawful to “[travel] in interstate or foreign commerce or [use] the mail or any facility in interstate or foreign commerce, with intent to . . . distribute the proceeds of any unlawful activity” where an “unlawful activity” under the Act is defined as “any business enterprise involving gambling . . . in violation of the laws of the state in which [the unlawful acts] are committed.”).

⁸ See Peter H. Flournoy & J. B. O’Donnell, *Private Correspondence and Federal Obscenity Prosecutions*, 4 SAN DIEGO L. REV. 76, 88 (1967).

⁹ 19 Stat. 90, Chap. 186, Prohibition on Mailing Obscene Materials and Lottery-Circulars, Rev. Stat. §§ 3893 and 3894 (emphasis added).

¹⁰ See Lottery Circulars, 15 U.S. Op. Atty. Gen. 203 (1877) (stating that “[l]egal lotteries are those established by law, like the Louisiana State Lottery, or the one authorized by the original charter of Washington”); see also “in States like Louisiana, Kentucky, Alabama, or Georgia, and Virginia, where I think they are permitted to draw lotteries of some character, it would be highly improper, in my judgment, to allow the postmasters to prevent the circulation of lottery circulars while those States allow lotteries. The provision of the law as it now stands operates upon ‘illegal lotteries’ only, upon lotteries that are unauthorized by law.” Cong. Rec. S. 4264 (June 30, 1876) (Mr. Wythe discussing the bill H.R. No. 2575 to amend sections 3893 and 3894 of the Revised Statutes).

explaining that “[u]nder this provision an abortion is ‘illegal’ if it is contrary to the laws of the State in which the abortion is performed.”¹¹

Similarly, when the Supreme Court upheld a federal statute prohibiting the broadcast of lottery advertising by any broadcaster located in a state that banned lotteries, they recognized that they could “accommodate the operation of legally authorized state-run lotteries consistent with continued federal protection to nonlottery States’ policies.”¹² Surely a similar compromise could be made with respect to the mailing of abortion-related material in abortion and non-abortion states.

B. Against a Local Construction of “Illegal”

There are at least three reasons to question the OLC’s interpretation of the Comstock Act. First, *Youngs Rubber Co.* is not controlling. This may be what conservative commentator Ed Whelan meant when he criticized the OLC’s opinion by claiming that the cases they cited did not actually support their position.¹³ Whelan contends that the Seventh Circuit case *Bours v. United States* actually undermines the notion that state law is relevant in the application of § 1461. There might be a good reason to think that the *Bours* opinion is more relevant to abortion

¹¹ H.R. REP. NO. 95-29 at 39-40 (1978), from the Subcommittee on Criminal Justice at 39-40 (1978).

¹² *United States v. Edge Broad. Co.*, 509 U.S. 418, 418 (1993). See also Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L. J. 611, 641 n. 118 (2007) (using *Edge Broadcasting Co.* and the existence of varying First Amendment rights under obscenity from state to state to argue that disparity created by a state that forbid abortion potentially prohibiting abortion advertising within that state and other states where such advertising would remain constitutionally protected would not be “wholly unprecedented”).

¹³ Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 1*, NAT’L REV. (Jan. 4, 2023) <https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs/>; Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 2*, NAT’L REV. (Jan. 5, 2023) <https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs-part-2/>; Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 3*, NAT’L REV. (Jan. 6, 2023) <https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs-part-3/>.

cases—of all the Circuit Court cases dealing with § 1461, *Bours* is the only one that specifically related to the abortion provision of the statute.¹⁴ The other courts apply the holding and reasoning of *Bours* to the contraception provision. Therefore, it might be somewhat circular to justify an expanded reading of the abortion provision with the other contraception cases, rather than looking to *Bours* itself.

Although *Bours* argued for a rule of reasonable construction, the court stated that when applying the federal law to “an alleged offensive use of the mails at a named place, it is immaterial what the local statutory definition of abortion is.”¹⁵ Rather than looking to which acts of abortion are included or excluded by the local statute, the *Bours* court stated that “the word ‘abortion’ in the national statute must be taken in its general medical sense.”¹⁶ So, those acts of abortion that are not covered excludes only “those acts that are in the interest of the national life.”¹⁷ This appears to reject the local construction. The repeated references to a “national” interest for a “national statute” seem to imply that enforcers of the statute should instead find some national definition of an illegal abortion and apply that to the law.¹⁸

The Second Circuit in *One Package* seems to suggest something similar when they state that they assume the law at issue “exempts only such articles as the act of 1873 excepted,” but are satisfied that the Comstock laws “embraced only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be

¹⁴ *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936) deals with a prosecution for the mailing of contraception-related articles or things (vaginal pessaries). The prohibition on mailing things or writings related to contraception was subsequently amended out of the law, which is discussed further in earlier sections of this Note.

¹⁵ *Bours v. United States*, 229 F. 960, 964 (7th Cir. 1915).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

used.”¹⁹ By referring to a singular Congressional intent, the court implies that there was one class of uses Congress took to be prohibited by the law, and another that Congress would have allowed. The court does not make any reference to state-by-state standards within this understanding.

Second, even the legislative history cuts against the OLC’s broader position. Congress’ decision not to amend the text of the law to include the word “illegal” before “abortion” could be seen as an implicit ratification of the judicial construction, or a stubborn adherence to the original text of the statute. In 1978, a House Report of the Subcommittee on Criminal Justice proposed modifying § 1461 to require “proof that the offender aided in the mailing of a means of procuring an illegal abortion,” explaining that “[u]nder this provision an abortion is ‘illegal’ if it is contrary to the laws of the State in which the abortion is performed.”²⁰ Although this report demonstrates a state-by-state understanding of the term ‘illegal,’ the fact that such an amendment to the Comstock Act laws was proposed in 1978 and not acted upon might indicate an unwillingness to statutorily enact this definition.²¹

A strictly textual reading of the statute cuts against the broader narrowing construction the OLC wants to read into §§ 1461 and 1462, in addition to the local interpretation of this judicial construction. The history of anti-contraception laws in Connecticut before *Griswold v. Connecticut*, 381 U.S. 479 (1965) might prove illustrative of how a court could defer to the text of the statute when dealing with a potential prosecution under §§ 1461 or 1462. In *Buxton v. Ullman*, the court rejected the argument that a life-or-health-preserving medical exception should

¹⁹ *United States v. One Package*, 86 F.2d 737, 739 (2d Cir. 1936).

²⁰ H.R. REP. NO. 95-29 at 39-40 (1978), from the Subcommittee on Criminal Justice at 39-40 (1978).

²¹ The proposed amendment was included as a part of the Criminal Justice Improvements Act, H.R. 13959, 95th Cong. (1978). The Act included a number of other proposed changes to Title 18 of the U.S. Code.

be read into an unenforced state anti-contraception statute by deferring to the separation of powers.²² The Connecticut Supreme Court stated that “[c]ourts cannot, by the process of construction, abrogate a clear expression of legislative intent, especially when, as here, unambiguous language is fortified by the refusal of the legislature, in the light of judicial interpretation, to change it.”²³ However, this textual reading might not be totally applicable given the renewed significance of the Comstock Act. In *Ullman*, The Supreme Court dismissed an appeal from another Connecticut ruling because they thought that there was no actual threat of prosecution under the statutes.²⁴ But now there are state attorneys general explicitly stating that they will look to enforce these laws.²⁵

United States v. Bott provides an example of another way courts could approach the statute. In this early case applying the prohibitions on mailing materials “designed and intended for the prevention of conception or procuring of abortion,”²⁶ the court found that, in light of differing state laws, the intent required by the statute could not require the intent to prevent conception or to procure abortion to be an element of the offense at all.²⁷ “The prevention of abortion in the several states is not within the power which, under the constitution, belongs to the United States,” and the only power Congress has is limited to the use of the mails.²⁸ So, the court

²² *Buxton v. Ullman*, 147 Conn. 48, 57, 156 A.2d 508 (Conn. 1959). “In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is.” *Id.* at 55. *See also* *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (Conn. 1940); *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582 (Conn. 1942); Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court before Griswold v. Connecticut*, 75 Iowa L. Rev. 915, 938 (1990) (“[t]he central focus of the court’s analysis was always on deference to the state legislature”).

²³ *Buxton v. Ullman*, 147 Conn. 48, 57, 156 A.2d 508, 513–14 (Conn. 1959).

²⁴ *Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L. Ed. 2d 989 (1961) (“This Court cannot be umpire to debates concerning harmless, empty shadows”).

²⁵ Lauren Berg, *20 AGs Warn CVS, Walgreens Against Mailing Abortion Pills*, LAW 360 (Feb. 2, 2023) <https://www.law360.com/articles/1572353/20-ags-warn-cvs-walgreens-against-mailing-abortion-pills>.

²⁶ *United States v. Bott*, 24 F. Cas. 1204 (C.C.S.D.N.Y. 1873).

²⁷ *Bott*, 24 F. Cas. at 1204.

²⁸ *Id.*

found that “designed or intended for the prevention of conception or procuring abortion” does not describe the intent which must be an element of the crime against the United States.²⁹ Instead, it is descriptive of the material made contraband. “The unlawful act of depositing contraband matter, coupled with the intent to deposit such matter, constitutes the crime. The guilty intent appears from the fact of the deposit of such matter by one knowing what article he deposits.”³⁰ Under such a reading of the law, whether or not the abortion was intended to comply with the relevant state law seems irrelevant.

This indicates that there are a variety of ways courts could apply the Comstock Act laws today. Proponents of enforcing the Comstock Act today argue that the OLC’s construction is too complicated to be applied. In recent letters sent to CVS Health and Walgreens advising the corporations that their plans to provide abortion pills by mail-order pharmacy are illegal under federal law, a group of Republican attorneys general claimed that courts would defer to the plain text of the statutes.³¹ They argued that 18 U.S.C. §1461 was “straightforward” and criticized the

²⁹ *Id.*

³⁰ *Id.*

³¹ Letter to Danielle Gray, Executive Vice President of Walgreens Boots Alliance, Inc., from Kris W. Kobach, Kansas Attorney General (Feb. 6, 2023); Letter to Tom Moriarty, General Counsel of CVS Health, from Andrew Bailey, Missouri Attorney General, Steve Marshall, Alabama Attorney General, Treg Taylor, Alaska Attorney General, Tim Griffin, Arkansas Attorney General, Ashley Moody, Florida Attorney General, Chris Carr, Georgia Attorney General, Todd Rokita, Indiana Attorney General, Brenna Bird, Iowa Attorney General, Daniel Cameron, Kentucky Attorney General, Jeff Landry, Louisiana Attorney General, Lynn Fitch, Mississippi Attorney General, Austin Knudsen, Montana Attorney General, Drew Wrigley, North Dakota Attorney General, Dave Yost, Ohio Attorney General, Gentner F. Drummond, Oklahoma Attorney General, Alan Wilson, South Carolina Attorney General, Marty Jackley, South Dakota Attorney General, Ken Paxton, Texas Attorney General, Sean D. Reyes, Utah Attorney General, Patrick Morrissey, West Virginia Attorney General (Feb. 1, 2023); Letter to Danielle Gray, Executive Vice President of Walgreens Boots Alliance, Inc., from Andrew Bailey, Missouri Attorney General, Steve Marshall, Alabama Attorney General, Treg Taylor, Alaska Attorney General, Tim Griffin, Arkansas Attorney General, Ashley Moody, Florida Attorney General, Chris Carr, Georgia Attorney General, Todd Rokita, Indiana Attorney General, Brenna Bird, Iowa Attorney General, Daniel Cameron, Kentucky Attorney General, Jeff Landry, Louisiana Attorney General, Lynn Fitch, Mississippi Attorney General, Austin Knudsen, Montana Attorney General, Drew Wrigley, North Dakota Attorney General, Dave Yost, Ohio Attorney General, Gentner F. Drummond, Oklahoma Attorney General, Alan Wilson, South Carolina Attorney General, Marty Jackley, South Dakota Attorney General, Ken Paxton, Texas

Department of Justice for issuing an opinion that “ties itself in knots trying to explain away § 1461’s prohibitions.”³²

The narrowing construction proposed by the OLC raises a lot of complicated issues. On the other hand, the plain text seems straightforward. But to adhere to the plain text and enforce the law today would be contrary to numerous judicial decisions and almost a century of executive action.³³

IV. A VAGUENESS CHALLENGE TO THE COMSTOCK ACT LAWS

The complications raised by what criminal intent would be required by §§ 1461 and 1462 are more than just a hurdle to successful prosecution, as suggested by the OLC. This Note will show that, when considered along with their history of nonenforcement, the lack of clarity as to what is actually prohibited by these statutes demand that they should be found void for vagueness if ever enforced and constitutionally challenged. This is the case whether or not one accepts the local interpretation of the judicial construction advanced by the OLC. So, this Note goes beyond the OLC Opinion and makes the original argument that the Comstock Act laws are unenforceable in the present day because they are too vague.

Attorney General, Sean D. Reyes, Utah Attorney General, Patrick Morrissey, West Virginia Attorney General (Feb. 1, 2023). “We reject the Biden administration’s bizarre interpretation, and we expect courts will as well. Courts do not lightly ignore the plain text of statutes.”. Feb. 1 Letters to Tom Moriarty and Danielle Gray.

³² Letter to Danielle Gray, Executive Vice President of Walgreens Boots Alliance, Inc., from Kris W. Kobach, Kansas Attorney General at 2 (Feb. 6, 2023).

³³ See *infra* Part I(C) and the lack of any prosecutions from 1900 to the present day under 18 U.S.C. §§ 1461 and 1462 for the mailing of surgical equipment intended for use in abortion procedures (revealed through an extensive search of Westlaw).

A. The Void for Vagueness Doctrine

Under the Due Process Clause of the Fifth Amendment, a criminal statute may be declared void if it is so vague that “men of common intelligence must necessarily guess at its meaning” and differ in their application of the law.³⁴ A penal statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”³⁵ The Supreme Court has applied the doctrine to statutes that are uncertain on their face, as well as those that are made unclear by judicial construction.³⁶

The Supreme Court has recently expanded the void for vagueness doctrine, with *Johnson v. United States* 576 U.S. 591 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019) marking a trend from the Court’s previous reluctance to void criminal statutes on this ground.³⁷ These decisions show that the void for vagueness has been taken seriously recently with respect to certain sentencing enhancements, indicating that the Court might examine vagueness within primary conduct more seriously than they have before.

³⁴ *Winters v. New York*, 333 U.S. 507, 518 (1948) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

³⁵ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926)).

³⁶ *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (“There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.”). Note that this applies to a judicial expanding, not narrowing, construction.

³⁷ See Melissa London, *Renewing the Vagueness Challenge to Crimes Involving Moral Turpitude*, 97 WASH. L. REV. 581, 617-620 (2022). See also Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 698 (2017) (noting that the Supreme Court only voided a law outside the First Amendment context for being unconstitutionally vague four times from 1960 until *Johnson v. United States*, 576 U.S. 591 (2015)).

There also seems to be a growing concern, articulated by Justice Gorsuch in his *Sessions* concurrence, that vague laws threaten the balance of separation of powers by granting too much power to the judges and prosecutors.³⁸ Unenforced laws with unclear application, such as §§ 1461 and 1462 implicate many of these same concerns.³⁹ In 2010, Justices Scalia, Thomas, and Kennedy supported voiding parts of the §§ 1341 and 1343 mail-fraud and wire-fraud statutes for vagueness.⁴⁰ Scalia argued that by using a judicial construction that “transform[ed] the prohibition of ‘honest-services fraud’ into a prohibition of ‘bribery and kickbacks,’” the Court was “wielding a power we long ago abjured: the power to define new federal crimes.”⁴¹ Since a “criminal statute must clearly define the conduct it proscribes, [... a] statute that is unconstitutionally vague cannot be saved [] by judicial construction that writes in specific criteria that its text does not contain.”⁴² Therefore, Scalia found that *Skilling* was correct to argue that the statute “fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits.”⁴³ The recent trend in Supreme Court decisions suggests that an argument like the one *Skilling* proposed has a better chance of success now than it did in 2010.

³⁸ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227–28 (2018). “Vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute’s contours through their enforcement decisions.” *Id.* at 1227–1228.

³⁹ *See* Desuetude, 119 HARV. L. REV. 2209, 2229 (2006) (summarizing the argument that when a prosecutor resurrects a desuete statute to bring an individual before a court, the executive essentially legislates through the reanimation of dead-letter laws). *See also* Alexander M. Bickel, *The Supreme Court, 1960 Term-Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 58–64 (1961) (making the same argument).

⁴⁰ *Skilling v. United States*, 561 U.S. 358, 415–424 (2010) (Scalia, J., concurring).

⁴¹ *Id.* at 415.

⁴² *Id.* at 415–416.

⁴³ *Id.* at 416.

B. The Local Interpretation of the Judicial Construction is Vague

The interpretation of the Comstock Act laws advanced by the OLC shows that the Comstock Laws are too vague to be workable. A federal criminal law regime that imports state regulations into its construction of the law is not in itself vague. However, a workable statute like 18 U.S.C. § 1955, the federal gambling statute, includes the limiting language and a definition that directly appeals to state laws in the text of the statute itself.⁴⁴

By contrast, the importation of state regulations is not actually conferred in the text of the Comstock Act statutes.⁴⁵ A court applying 18 U.S.C. § 1461 would have to read the word “illegal” into the law and decide how “illegal” should be defined. Even using the local interpretation of the judicial construction seems to invite discretionary application of exactly which state laws to apply. Interstate mailing, unlike conducting business, implicates more than one state. Congress recognized that such a construction might be confusing when dealing with the anti-lottery mailing provision in 1976. By reading the word “illegal” to modify abortion in the Comstock Act Statutes, courts have created precisely the controversy that Congress decided to amend out of the lottery provision of Rev. Stat. § 3893.⁴⁶ The object of the amendment was to “secure uniformity and prohibit lottery circulars of any kind from passing through the mails,” as the House recognized that the law as written resulted in the confusing situation where “[i]n some

⁴⁴ 18 U.S.C. § 1955, Prohibition of illegal gambling businesses (“As used in this section ‘illegal gambling business’ means a gambling business which... is a violation of the law of a State or political subdivision in which it is conducted....”).

⁴⁵ 18 U.S.C. §§ 1461 and 1462. The lack of any limiting words in the text of the statute makes the judicial construction of such words open to indeterminacy and discriminatory application. Some courts might want to argue that “[i]n the absence of any words of limitation, the language used must be given its full and natural significance, and held to exclude from the mails every form of notice whereby the prohibited information is conveyed.” *United States v. Foote*, 25 F. Cas. 1140, 1141 (C.C.S.D.N.Y. 1876).

⁴⁶ See H.R. 2575, 44th Cong. Session 2 (1876) (amending the lottery law to strike out the word “illegal” where it appeared before “lotteries,” which reflected the concept that lotteries were legal in some state but not others). Senator Whyte from Maryland made a motion to strike out Section 2. The motion to strike out was not agreed to. Cong. Rec. (S) 4262-4264 (June 30, 1876).

states lotteries are legalized, in others they are prohibited, so that we have matters mailable in one State that are not mailable in another.”⁴⁷ Mr. Hamlin stated that the Department “labor[ed] under [the difficulty of] determining what are and what are not legal lotteries.”⁴⁸

Determining the criminal intent required by the sender on a state-by-state basis would result in a similar difficulty. This would be exacerbated in cases involving importation from another country. Should the sender’s intent be determined on the final destination state? Or the first state that the mail happens to reach? The choice of venue would also seem to promote arbitrary enforcement of the law. Unlike the mail fraud statutes, §§ 1461 and 1462 have no “built-in” venue provisions that would specify where a case might be brought, suggesting that a case might be brought in any state in which the mail passes through.⁴⁹ This would create an unacceptable result, as a sender might be subject to a number of differing standards of legality or illegality of an abortion.

C. The National Interpretation is also Unconstitutionally Vague

However, if one rejects the OLC’s construction and demands a national definition of an “illegal abortion,” there are even more reasons that the statute should be void for vagueness. Since there is no determined national standard for an ‘illegal abortion,’ such an interpretation would not give abortion providers any notice as to what conduct is actually prohibited by the law.

⁴⁷ 4 CONG. REC. 3656 (1876).

⁴⁸ 4 CONG. REC. 4262 (1876).

⁴⁹ 18 U.S.C. § 3237(a) provides that in cases where the offense was begun in one district and completed in another, venue may be laid in any district through which the offense was continued, unless otherwise explicitly provided, like in the case of mail fraud. Compare 18 U.S.C. § 1341 (carefully specifying the locus of the offense) with 18 U.S.C. § 1461 which merely says “whoever knowingly uses the mails”). U.S. Dep’t of Just., Just. Manual § 966, Venue in Mail Fraud (updated Jan. 21, 2020) <https://www.justice.gov/archives/jm/criminal-resource-manual-966-venue-mail-fraud>.

First, there is reason to think that such a construction would interfere with state's rights in a way that makes its application unclear. If the federal definition of "illegal abortion" was more restrictive than the definition in a given state, then abortion regulation decisions would essentially be taken away from the states. The interpretation of the federal statute needs to be constrained so that it does not interfere with matters of regulation traditionally reserved to the States. Otherwise, potential defendants could object to the enforcement of the federal statutes for encroaching upon the power of the states.⁵⁰ Although the similar anti-lottery mailing provision of Rev. Stat. § 3894 was held to be constitutional by the Supreme Court after the word "illegal" was removed in 1877,⁵¹ this action was not undertaken without some pushback from Congress.⁵² In this case, a national definition of an illegal abortion that imposed a federal restriction would not only be difficult to define and implement, it would also prevent states from advancing their state interest as articulated by *Dobbs*.⁵³

⁵⁰ See *Bond v. United States*, 564 U.S. 211 (2011) (finding that the petitioner, an indicted defendant, had standing to challenge the validity of the federal law he was convicted under for conflicting with constitutional principles of federalism). "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.* at 222. And *Dobbs* did explicitly reserve the matter of abortion regulation to the states. "The authority to regulate abortion is returned to the people and their elected representatives." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ 142 S. Ct. 2228, 2234 (2022).

⁵¹ *Ex parte Jackson*, 96 U.S. 727, 24 L. Ed. 877 (1877).

⁵² 4 CONG. REC. 4262 (1876). "The second section goes a step further, and strikes out the word 'illegal,' so that in Louisiana, in Missouri, in Kentucky, where lotteries are legalized, no circular can be mailed at Louisville for Frankfort, for instance. Certainly the Senate does not mean to decide that the citizens of a State where lotteries are legal have no right to send a lottery scheme or circular front one portion of the State to another. That seems to me to be interfering with the rights of the people of the States where they choose to think that the sale of lottery tickets is not criminal or improper." *Id.* (statement by Mr. Wythe in support of not amending the law to remove the word 'illegal'). See also "I say, for one, that Congress has no right to prevent the carriage through the mail of such matters as are legalized by the States themselves." *Id.* (Mr. West, supporting Mr. Wythe's motion).

⁵³ See Stephen G. Gilles, *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?* Forthcoming in 92 Miss. L.J. – at *13 (2022) (arguing that the right to a health-preserving abortion, as articulated in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) would be unworkable because it would deprive a State of the ability to advance a compelling state interest). Surely

However, this is assuming that one could even determine a national definition for an ‘illegal abortion.’ Under guidance from *Bours*, an ‘illegal abortion’ would be an abortion undertaken for some reason “inimical to the national life.”⁵⁴ Although this would most likely exclude abortions undertaken to preserve the life of the mother,⁵⁵ it is unclear what other uses it would exclude or include. Does a health-preserving abortion enter the national standard?⁵⁶ Although such exceptions are more common in the present day, an early law state enacted in Washington, D.C. in 1901 criminalized abortion “unless when necessary to preserve [the woman’s] life or health.”⁵⁷

It seems as if promoting women’s health would not be “inimical to the national life.”⁵⁸ But would such a reading of the narrowing construction also render the statutes void for vagueness? In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Supreme Court found that a Pennsylvania state statute that used almost identical wording to the language of *Roe*’s life-or-health exception was unconstitutionally vague. The statute required a doctor performing an abortion post-viability to employ an abortion technique that would provide the best opportunity for the fetus to be aborted alive unless a different technique would be “necessary in order to

allowing Congress to statutorily dictate what could be mailed to produce an abortion would also effectively limit a state’s ability to regulate the protection of “potential life.”

⁵⁴ *Bours v. United States*, 229 F. 960, 964 (7th Cir. 1915).

⁵⁵ See Stephen G. Gilles, *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?* Forthcoming in 92 Miss. L.J. – at *6 (2022) (“the right to a life-preserving abortion has extremely strong support in our legal history and tradition”). See also *Id.* at *17 (“Without exception, the 19th-century statutes compiled in the Appendix to *Dobbs* permitted life-preserving abortions, and no State subsequently prohibited them.”).

⁵⁶ Such a right was recognized by the Court in *Roe v. Wade* 410 U. S., 154 (1973) and it is uncertain whether it was overruled by *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. __ (2022). See Stephen G. Gilles, *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?* Forthcoming in 92 Miss. L.J. (2022) (arguing that if *Dobbs* did not overrule *Roe* and *Casey in toto*, the constitutional right to a health-preserving abortion probably does not survive, while the constitutional right to a life-preserving abortion does).

⁵⁷ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. __, Appendix B at 107 (2022).

⁵⁸ *Bours v. United States*, 229 F. 960, 964 (7th Cir. 1915).

preserve the life or health of the mother.”⁵⁹ Because the statute did not specify whether the woman’s life and health must always prevail over the fetus’ life and health when they conflict, the Court found that this exception was so poorly defined that a doctor would not have fair warning as to what conduct was prohibited.⁶⁰ Similarly, 18 U.S.C. § 1461 makes no such specification, even though almost all courts would presumably allow the sending of abortion-related articles when necessary to save the woman’s life as not for the purposes of an “illegal” abortion.⁶¹

Although the core vagueness the court identified in this statute was in defining “viability,” the Court found the statute unconstitutionally vague because it “conditions potential criminal liability on confusing and ambiguous criteria.”⁶² Even though viability is no longer a federal standard, a number of states still use fetal viability as a limit in their abortion statutes.⁶³

⁵⁹ *Colautti v. Franklin*, 439 U.S. 379, 379 (1979), abrogated by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022).

⁶⁰ Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative-Safety*, 85 Notre Dame L. Rev. 525, 567-568 (2010). See *Colautti*, 439 U.S. at 400-401 (“it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a ‘trade-off’ between the woman’s health and additional percentage points of fetal survival. . . . where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.”).

⁶¹ See Gilles *supra* note 168 at *17 (explaining why the right to a life-preserving abortion has a powerful claim to being deeply rooted in our legal history and tradition). “The early American statutes codifying the crime of abortion generally contained life-of-the-mother exceptions, or language from which courts could infer that a life-saving abortion would not be ‘unlawful.’ *Id.* Gilles even argues that the right to a life-saving abortion is a new implied constitutional right after *Dobbs*.”

⁶² *Colautti*, 439 U.S. at 394. Viability is no longer a federal standard. *Dobbs* overturned *Roe*’s holding that a woman has the right to choose to have an abortion before viability. (“The viability line, which *Casey* termed *Roe*’s central rule, makes no sense.” *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ___, 142 S. Ct. 2228, 2282 (2022)).

⁶³ California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Montana, New York, Rhode Island, Washington, and Wyoming still use “fetal viability” as a limit in their abortion statutes. *States with Gestational Limits for Abortion*, KAISER FAMILY FOUND. (last updated Jan. 20, 2023), <https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

Does the importation of this state standard into the federal law make it void for vagueness for the same reasons as the statute in *Colautti*?⁶⁴

To add to the confusion, the FDA has “determined the use of mifepristone in a regimen with misoprostol to be safe and effective for the medical termination of early pregnancy,”⁶⁵ leading some to argue that the FDA regulation of abortion regulation would preempt more restrictive state statutes.⁶⁶ It is unclear how FDA regulation would interact with a restrictive federal law. However, the FDA’s blessing to dispense mifepristone for medical abortions by mail-order pharmacies and other telemedicine providers would indicate that such use is permitted under federal law,⁶⁷ despite the existence of the Comstock mailing provisions.

The problem of having to interpret the concept of an ‘illegal abortion’ under §§ 1461 and 1462 is compounded by the fact that Congress passed these laws so long ago and they were subsequently never enforced in the context of abortion-related articles. Attitudes towards the acceptability of abortion have vastly changed in the last century, along with sexual standards.⁶⁸ Should courts use modern standards of decency when interpreting the statute? Or should judges be forced to imagine what Congress in 1873 would have imagined as decent? These standards seem inapplicable to modern life for a multitude of reasons. Another issue with a criminal law that relies upon notions of decency is that these standards are constantly in flux. The Supreme

⁶⁴ “The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself.” *Colautti*, 439 U.S. at 395.

⁶⁵ *OLC Opinion supra* note 9 at 17.

⁶⁶ Peter Grossi and Daphne O’Connor, *FDA Preemption of Conflicting State Drug Regulation and the Looming Battle Over Abortion Medications*, DRAFT 10/24/22.

⁶⁷ FDA Response to American Association of Pro-Life Obstetricians and Gynecologists Citizen Petition, Docket No. FDA-2019-P-1534 (December 16, 2021) at 6. See also *Recent Guidance: Update to FDA’s Risk Evaluation and Mitigation Strategy for Mifepristone on Dec. 16, 2021, Eliminating In-Person Dispensing Requirement*, 35 HARV. L. REV. 2238 (2022).

⁶⁸ R. Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 POPULATION STUDIES 53, (1974).

Court has acknowledged that a criminal statute that incorporates “undeniably opaque” notions like decency into its terms “could raise substantial vagueness concerns.”⁶⁹

This struggle also reflects the desuete state of the Comstock Act laws. Since the laws have been unenforced for so long, the meaning has not had the chance to be tested or to evolve. The normative values behind vagueness challenges have been linked to the values that motivate the doctrine of desuetude before.⁷⁰ The Supreme Court should further expand the void for vagueness doctrine, in line with their recent decisions, by developing the normative basis of the vagueness doctrine to include concerns such as the lack of notice facing potential defendants that provide for the normative bases of the doctrine of desuetude.⁷¹ This should reflect the idea that nonenforcement is a policy decision.⁷² The decades of nonenforcement of the Comstock Act Laws should make one uncertain about how they should be applied in the present day, for these policy reasons, in addition to the practical hurdles facing their application. The very fact that a court could apply either a local or national definition of an “illegal abortion” when deciding this

⁶⁹ Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 571 (1998).

⁷⁰ See *Desuetude*, 119 HARV. L. REV. 2209, 2217 text accompanying n. 52-53 (2006); (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 152-55 (Yale Univ. Press 2d ed. 1986) and Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 29-30, 73 (2003) as examples of scholars who argue that desuete statutes raise due process issues similar to those arising from unconstitutionally vague statutes.

⁷¹ See John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014) (summarizing Bickel and Sunstein’s contentions that fair notice and discriminatory enforcement problems are real constitutional concerns that have motivated decisions made on other grounds).

⁷² *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (“The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis.”). Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL’Y REV. 169, 185 (1997-1998) (“When the legislature completely acquiesces to executive nonenforcement for an extended period of time, nonenforcement must be taken as the legislature’s intent as well as the executive’s.”).

law shows that it is open to arbitrary enforcement. So, what an ‘illegal abortion’ might be under this law is an unascertainable standard.⁷³

A void for vagueness challenge to the criminal statute would also prevent the laws’ secondary use through civil RICO lawsuits. Because RICO is predicated on criminal conduct, plaintiffs must plead and establish that each defendant “intended to engage in the conduct with actual knowledge of the illegal activities.”⁷⁴ If the enforcement of the statutes was so vague as to obscure what conduct was actually criminal, no plaintiff could ever prove that there was such intent.

⁷³ See Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEXAS L. REV. 1049, 1049-50 (2020). (“A close look at the statutes that the Supreme Court has declared to be vague over the past century reveals that they generally share one of two defects: they require an actor to conform his conduct either to unknowable objective facts or to unascertainable normative standards. Such statutes violate Lord Coke’s ancient dictum by requiring that persons perform the impossible.”).

⁷⁴ JENNER & BLOCK *supra* note 90 at 10.

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11 June 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at Notre Dame Law School writing to apply for a position as a law clerk in your chambers for the 2024-2025 term.

Enclosed please find my resume, law school and undergraduate transcripts, writing sample, and letters of recommendation from the following people:

Prof. Marah Stith McLeod	Prof. Roger Alford	Prof. Ed Edmonds
Notre Dame Law School	Notre Dame Law School	Notre Dame Law School

If I can provide any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Nicholas Busher

NICHOLAS R. BUSER

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EDUCATION

University of Notre Dame Law School

Notre Dame, IN

Juris Doctor Candidate

May 2024

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Cornell University

Ithaca, NY

Bachelor of Arts in Government with Minor in Business

May 2021

GPA: 3.52

- Division I Varsity Football Team, Offensive Lineman (three-year starter); Dean's List; 2021 NFF Hampshire Honor Society for Academic & Athletic Excellence; Cornell Film Club

EXPERIENCE

Jones Day

Cleveland, OH

Summer Associate

May 2023 – July 2023

LawInSport Ltd.

London, UK

Legal Extern

Jan. 2023 – May 2023

- Conducted legal research and writing for one of the global leaders in sports law services
- Attended international arbitration conference in Lausanne, Switzerland

University of Notre Dame Athletic Department

Notre Dame, IN

Intercollegiate Athletics Extern

Aug. 2022 – Dec. 2022

- Analyzed and interpreted National Collegiate Athletic Association guidelines
- Drafted department policies and ensured teams and athletes complied with regulations

United States District Court for the Southern District of Ohio

Dayton, OH

Intern to Hon. Michael J. Newman

June 2022 – Aug. 2022

- Reviewed motions, drafted bench memoranda, and assisted with opinions
- Conducted extensive research and writing on prison inmates' First Amendment rights

University of Notre Dame Law School

Notre Dame, IN

Research Assistant to Professor Roger Alford

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- Analyzed the applicability of different antitrust frameworks to social media platforms
- Conducted additional research on the historical background of significant antitrust cases

Ohio Second District Court of Appeals

Dayton, OH

Court Intern

June 2021 – Aug. 2021

- Assisted Court Administrator with file organization and information gathering
- Evaluated live arguments, briefs, transcripts, and other court-related activities

National Risk Management Services

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Marketing & Content Strategist Intern

June 2020 – Aug. 2020

- Wrote, designed, and implemented ad campaign that increased online customer engagement by 32%
- Oversaw migration of firm's web hosting, leading to 80% increase in site traffic and 90% increase in page speed

INTERESTS

- Hiking in the Smoky Mountains; Bruce Springsteen; Stanley Kubrick movies; fantasy football; *The Lord of the Rings*

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Page: 1

Birth Date: 08-27-XXXX

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Program: Juris Doctor
College: Law School
Major: Law

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS				OVERALL TOTALS			
						ATTEMP HRS	EARNED HRS	GPA HRS	GPA	ATTEMP HRS	EARNED HRS	GPA HRS	GPA
UNIVERSITY OF NOTRE DAME CREDIT:													
Fall Semester 2021													
Law School													
LAW	60105	Contracts	4.000	B+	13.332								
LAW	60302	Criminal Law	4.000	A-	14.668								
LAW	60703	Legal Research	1.000	A	4.000								
LAW	60705	Legal Writing I	2.000	A-	7.334								
LAW	60901	Torts	4.000	A-	14.668								
Total					54.002	15.000	15.000	15.000	3.600	15.000	15.000	15.000	3.600
Honor Roll													
Spring Semester 2022													
Law School													
LAW	60307	Constitutional Law	4.000	A	16.000								
LAW	60308	Civil Procedure	4.000	A-	14.668								
LAW	60707	Legal Resrch & Writing II-MC	1.000	B+	3.333								
LAW	60906	Property	4.000	A-	14.668								
LAW	70503	Family Law	3.000	A-	11.001								
LAW	75700	Galilee	1.000	S	0.000								
Total					59.670	17.000	17.000	16.000	3.729	32.000	32.000	31.000	3.667
Honor Roll													
Fall Semester 2022													
Law School													
LAW	70315	Administrative Law	3.000	B+	9.999								
LAW	70365	Federal Criminal Practice	3.000	B+	9.999								
LAW	70451	Criminal Adjudication	3.000	A	12.000								

CONTINUED ON PAGE 2

UNIVERSITY OF NOTRE DAME

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Date Issued: 02-JUN-2023
Page: 2

Birth Date: 08-27-XXXX

CRSE	ID	COURSE TITLE	CRS	GRD	QPTS	UND SEMESTER TOTALS				OVERALL TOTALS			
						ATTEMP HRS	EARNED HRS	GPA HRS	GPA	ATTEMP HRS	EARNED HRS	GPA HRS	GPA
University of Notre Dame Information continued:													
LAW	70908	Intercollegiate Athl Ext Inst	1.000	A	4.000								
LAW	73717	Transnational Civil Litigation	3.000	A-	11.001								
LAW	75749	Law Review	1.000	S	0.000								
LAW	75908	Intercollegiate Athletics Ext	1.000	S	0.000								
		Total			46.999	15.000	15.000	13.000	3.615	47.000	47.000	44.000	3.652
Honor Roll													
Spring Semester 2023													
Law School													
LAW	74101	LE Business Associations	3.000	A	12.000								
LAW	74130	LE Advanced Topics in Con Law	2.000	A	8.000								
LAW	74253	LE International Refugee Law	3.000	A	12.000								
LAW	74731	LE London Externship	2.000	S	0.000								
LAW	74749	LE Law Review	1.000	S	0.000								
LAW	74821	LE Jurisprudence	3.000	B+	9.999								
		Total			41.999	14.000	14.000	11.000	3.818	61.000	61.000	55.000	3.685
Honor Roll													
Fall Semester 2023													
IN PROGRESS WORK													
LAW	70301	M Immigration Law	3.000	IN PROGRESS									
LAW	70311	M Federal Courts	3.000	IN PROGRESS									
LAW	70354	M Labor and Employment Law	3.000	IN PROGRESS									
LAW	70468	M Post-Conviction Remedies	2.000	IN PROGRESS									
LAW	70808	M Legal Ethics: Prof. R Examined	3.000	IN PROGRESS									
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***** TRANSCRIPT TOTALS *****													
NOTRE DAME	Ehrs:	61.000	Qpts:	202.670									
	GPA-Hrs:	55.000	GPA:	3.685									
TRANSFER	Ehrs:	0.000	Qpts:	0.000									
	GPA-Hrs:	0.000	GPA:	0.000									
OVERALL	Ehrs:	61.000	Qpts:	202.670									
	GPA-Hrs:	55.000	GPA:	3.685									
***** END OF TRANSCRIPT *****													

CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.

The most frequently used codes are:

AF	Angers, France
DC	Washington, DC
FA	Fremantle, Australia
IA	Innsbruck, Austria
IR	Dublin, Ireland
LA	London, England (Fall/Spring)
LE	London, England (Law-JD)
LG	London, England (Summer EG)
LS	London, England (Summer AL)
PA	Perth, Australia
PM	Puebla, Mexico
RE	Rome, Italy
RI	Rome, Italy (Architecture)
SC	Santiago, Chile
SP	Toledo, Spain

For a complete list of codes, please see the following website:
<http://registrar.nd.edu/pdf/campuscodes.pdf>

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:

<http://registrar.nd.edu/students/gradeinfo.php>

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.

I	0	Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
U		Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S	Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
V	Auditor (Graduate students only).
W	Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
P	Pass in a course taken on a pass-fail basis.
NR	Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
NC	No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: <http://registrar.nd.edu/students/gradeinfo.php>

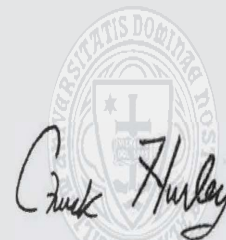
THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: <http://registrar.nd.edu/students/gradeinfo.php>

TRANSCRIPT NOT OFFICIAL IF WHITE SIGNATURE AND BLUE SEAL ARE DISTORTED



CHUCK HURLEY, UNIVERSITY REGISTRAR

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without the written consent of the student. Alteration of this transcript may be a criminal offense.

COURSE NUMBERING SYSTEM

Previous course numbering systems (prior to Summer 2005) are available at the following website:

http://registrar.nd.edu/faculty/course_numbering.php

Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).

The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX	= Pre-College course
ENGL 1 X - XXX	= Freshman Level course
ENGL 2 X - XXX	= Sophomore Level course
ENGL 3 X - XXX	= Junior Level course
ENGL 4 X - XXX	= Senior Level course
ENGL 5 X - XXX	= 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX	= 1st Year Graduate Level Course
ENGL 7 X - XXX	= 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX	= 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX	= Upper Level Graduate Level Course

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RECORD OF: Nicholas Robert Busher

CORNELL I.D. NO.: 4760538

RECORD DATE: 9/20/2022

PAGE: 1 of 2



TOTAL							TOTAL						
COURSE TITLE	SUBJECT/NUMBER	MEDIAN	ENROLLED	UNITS	GRADE		COURSE TITLE	SUBJECT/NUMBER	MEDIAN	ENROLLED	UNITS	GRADE	
FALL 2017							FALL 2019						
Program: Arts and Sciences							Program: Arts and Sciences						
Plan: Undeclared							Plan: Government						
INTRO TO AMERICAN STUDIES	AMST	1101	(B+)	(29)	4.00	A-	THE AMERICAN PRESIDENCY	GOVT	3161	(A-)	(32)	4.00	A-
INTRO MACROECONOMICS	ECON	1120	(A-)	(256)	3.00	B-	MARKETING PRINCIPLES	HADM	2410	(A-)	(246)	3.00	B+
FWS: LET'S PLAY!	GERST	1118	(A-)	(17)	3.00	A-	HISTORY OF EXPLORATION	HIST	1700	(A-)	(92)	3.00	A-
CALCULUS I	MATH	1110	(B)	(407)	4.00	C	ELEMENTS OF MUSICAL NOTATION	MUSIC	1100	(N/A)		1.00	SX
VARSITY FOOTBALL	PE	1905	(N/A)		1.00	SX	VARSITY FOOTBALL	PE	1905	(N/A)		1.00	SX
							ELEMENTS OF TAMIL LANG/CULTURE	TAMIL	1100	(A)	(21)	1.00	A
SPRING 2018							SPRING 2020						
Program: Arts and Sciences							Program: Arts and Sciences						
Plan: Undeclared							Plan: Government						
SPORTS/POLITICS AMERICAN HIST	AMST	1585	(A-)	(113)	4.00	B+	DURING THE SPRING 2020 SEMESTER, THE COVID-19 PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES REFLECT THE TUMULT OF THE TIME, NOT NECESSARILY THE WORK OF THE INDIVIDUAL.						
OUR SOLAR SYSTEM	ASTRO	1102	(B+)	(105)	3.00	S							
INTRO MICROECONOMICS	ECON	1110	(B+)	(434)	3.00	B							
INTRO TO COMPARATIVE POLITICS	GOVT	1313	(A-)	(191)	4.00	A-							
FWS: BIBLICAL JOSEPH	NES	1935	(A-)	(16)	3.00	A-							
VARSITY FOOTBALL	PE	1905	(N/A)		1.00	SX	INTRO TO BUSINESS MANAGEMENT	AEM	1200	(N/A)		3.00	A
							NATURE FUNCTIONS LIMITS OF LAW	GOVT	3131	(N/A)		4.00	A
							AMERICAN CAPITALISM	HIST	1540	(N/A)		4.00	A
							THE LANDS BETWEEN: E. EUROPE	HIST	2958	(N/A)		4.00	S
							VARSITY FOOTBALL	PE	1905	(N/A)		1.00	SX
FALL 2018							FALL 2020						
Program: Arts and Sciences							Program: Arts and Sciences						
Plan: Undeclared							Plan: Government						
INTRODUCTORY OCEANOGRAPHY	BIOEE	1540	(A-)	(914)	3.00	A-	**DEAN'S LIST**						
PROBABILITY MODELS	ECON	3110	(A-)	(135)	4.00	C							
MAKING SENSE OF WORLD POLITICS	GOVT	1817	(B+)	(141)	4.00	B							
VARSITY FOOTBALL	PE	1905	(N/A)		1.00	SX							
ELEMENTARY SWAHILI I	SWAHL	1100	(A)	(13)	4.00	C-							
SPRING 2019							SPRING 2021						
Program: Arts and Sciences							Program: Arts and Sciences						
Plan: Undeclared							Plan: Government						
LITERATURE, SPORT AND IDEOLOGY	ASRC	2505	(N/A)		3.00	B+							
ELECTORAL (MAL)PRACTICE	GOVT	2041	(A-)	(31)	4.00	A							
(IM)MIGRATION AND (IM)MIGRANTS	GOVT	2152	(A-)	(68)	4.00	A							
HIST & POLITICS OF MOD EGYPT	GOVT	2673	(A-)	(96)	3.00	A-							
VARSITY FOOTBALL	PE	1905	(N/A)		1.00	SX							
ELEMENTARY SWAHILI II	SWAHL	1101	(N/A)		4.00	S							

SEND TO: Nicholas Busher
nrb78@cornell.edu
DOCID:TWG6001J
United States



RECORD OF: Nicholas Robert Busher

CORNELL I.D. NO.: 4760538

RECORD DATE: 9/20/2022

PAGE: 2 of 2

TOTAL						TOTAL					
COURSE TITLE	SUBJECT/NUMBER	MEDIAN	ENROLLED	UNITS	GRADE	COURSE TITLE	SUBJECT/NUMBER	MEDIAN	ENROLLED	UNITS	GRADE
SPRING 2021											
Program: Arts and Sciences											
Plan: Government											
AMERICAN SOCIETY THROUGH FILM	AMST	1290	(B+)	(14)	3.00	A					
WIM: THE COLD WAR	GOVT	3837	(A-)	(54)	4.00	A-					
MAJOR SEMINAR	GOVT	4000	(A)	(60)	4.00	A					
COURSE TOPIC(S): US FOREIGN POL IN COMP PERSPEC											
FINANCE	HADM	2250	(A)	(183)	3.00	A-					
VARSITY FOOTBALL	PE	1905	(N/A)		1.00	SX					

Cumulative GPA: 3.515

CORNELL UNIVERSITY
ARTS AND SCIENCES
BACHELOR OF ARTS
GOVERNMENT
BUSINESS MINOR
MAY 30, 2021

END OF TRANSCRIPT

SEND TO: Nicholas Busher
nrb78@cornell.edu
DOCID:TWG6U0IJ
United States

873

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am most pleased to forward to you my highest endorsement and recommendation in support of Nicholas R. Busher who is seeking a position as a judicial clerk in your chambers. Nick is currently a second-year law student at the Notre Dame Law School, and he will graduate in May 2024. Nick is currently studying in England as part of our London Law Programme.

To provide some background and context for my comments, I am an Emeritus Professor of Law at the Notre Dame Law School. From 2006-2017, I served as the Associate Dean for Library and Information Technology and a tenured Professor of Law. Prior to returning to Notre Dame, my undergraduate alma mater, I served in similar library director positions at the law schools at the University of St. Thomas in Minnesota, Loyola University New Orleans, and the William and Mary Law School. I have over four decades of experience teaching and working with students researching and writing papers on sports and entertainment law topics as well as students in both first year and advanced legal research classes. I am particularly proud of the fact that I have assisted over 60 of my students in gaining publication of their work produced under my guidance in law reviews beyond those at my law school at the time. I think you would agree that outstanding writing and research ability is critical for a judicial law clerk. I have reviewed Nick's work in my externship class and as the faculty advisor for his law review note. I also reviewed a transnational law class paper and a summer work project. I believe that my analysis will assist you in considering his clerkship application.

During the 2022 fall semester, Nick was a member of our Intercollegiate Athletics Externship that I co-direct with Brent Moberg, the Director of Compliance. One of the requirements for the externship is a paper. Nick submitted an outstanding paper, "Transferring Shouldn't Require the Luck of the Irish: On Notre Dame's Place in the Current NCAA Transfer Landscape," addressing one of the most dynamic areas in intercollegiate athletics over the past three years. The paper was a combination of a major research effort plus an informed perspective that Nick developed from working inside the Compliance Office. The analysis, research, and writing were all outstanding.

Furthermore, I served as the faculty advisor for Nick's Notre Dame Law Review Note, "Playing for More Than Love of the Game: Collegiate Athletics and the NIL Revolution." This also addressed a dynamic area in intercollegiate sports brought about by major litigation against the NCAA and its amateurism philosophy. The article provided a brief history of the NCAA's amateurism principle before turning to a discussion of the NCAA's history of defending antitrust lawsuits including a detailed section on the recent NCAA v. Alston Supreme Court decision. Properly noting that the case did not explicitly deal with NIL rights, Nick turned to Associate Justice Kavanaugh's concurring opinion that put the NCAA on notice that many of its rules violate antitrust law. The remainder of the paper covers enacted state and proposed federal legislation, the NCAA's interim policy, NCAA enforcement, the influence of boosters and the creation of collectives concluding with some proposals and solutions. I have read much about NIL and presented talks on this topic, and Nick's work on his note is a masterful, in-depth treatment of this historic change in intercollegiate athletics.

As a student in the Notre Dame London Programme, Nick is an extern for LawInSport Ltd. LawInSport produces significant content on international sports law issues. As an extern, Nick is producing web-based articles and videos that involve substantial research and writing. The externship is providing an added global dimension to Nick's knowledge of sports and the law.

Nick's interest in sports law includes an impressive foundation as a football player. He played football as an undergraduate at Cornell University where he was a three-year starter as an offensive lineman. In high school, Nick was named a first-team, all-state selection at Archbishop Alter High School. I have family roots in Ohio, and I am familiar with Archbishop Alter, a highly regarded academic institution in Kettering.

I also reviewed Nick's Transnational class paper, "Admit It, I Never Said I Was an Expert: A Cross Boarder Comparison of Expert Witness Admissibility Standards in the United States, Canada, and Germany," and a Motion to Dismiss in Terry v. Crawford. Both efforts underscore Nick's substantial research ability combined with outstanding analysis and writing.

Nick also interned last summer with Judge Michael Newman of the Southern District of Ohio. We had an excellent conversation about what he learned in Judge Newman's chambers, and I think that experience provided an excellent foundation for Nick to serve in your chambers.

To summarize, Nick's research and writing abilities are outstanding, and he possesses an engaging personality, a strong work ethic, and a keen analytical mind. He has tremendous drive and ambition that was built over years of dedication to football and academic pursuits. He possesses outstanding research and writing ability. I certainly hope that you will give Nick's application serious consideration. If I can be of any further assistance in your deliberations, please do not hesitate to contact me at 574-360-2156 or at edmonds.7@nd.edu.

Sincerely,

Ed Edmonds

Ed Edmonds - edmonds.7@nd.edu - 574-631-5922

Professor Emeritus of Law

Ed Edmonds - edmonds.7@nd.edu - 574-631-5922

Notre Dame Law School
P. O. Box 780
Notre Dame, IN 46556

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to express my strong support for Nicholas Busher to serve as a judicial law clerk in your chambers. Nick has demonstrated excellent research and writing abilities and outstanding intellectual skills and drive for success. Nick was so exceptional that I invited him to be my research assistant following his first year of law school. Based on that background, I can speak with authority on his qualifications to serve as a judicial law clerk.

As a student in my Constitutional Law class and my Transnational Civil Litigation class, Nick was articulate, thoughtful, and thorough, providing important insight in class discussion. I found him to be genuinely interested and enthusiastic to tackle challenging legal issues—which was reflected in his high performance in my Constitutional Law class. As a research assistant, Nick was indispensable, providing in-depth, yet concise, research and analysis on solutions regarding antitrust issues for my article in the *SMU Science and Technology Law Review on Regulating Digital Advertising Markets*. He went to great lengths to gain an accurate understanding of proposed antitrust legislation in Congress. This included extensive research on the proposed legislation in Congress and detailed examination of potential behavioral and structural remedies that have been applied in other contexts. From his work as my assistant, Nick reaffirmed that he is a highly dedicated individual and excellent research assistant, all the while balancing his responsibilities for Judge Newman as a Judicial Intern.

Beyond my confidence in Nick's academic qualifications, Nick has been a pleasure to work with and to mentor. He has demonstrated strong interpersonal skills, professionalism, maturity, and strength of character. Nick is completely reliable, successfully completing every task I assigned to him on time and with high quality.

As a former appellate clerk for Judge James Buckley, I am confident Nick would have held his own among my co-clerks on the D.C. Circuit. And, as former Deputy Assistant Attorney General for International Affairs for the Antitrust Division, I am impressed by Nick's dedication to government service. He has worked two summers as a judicial intern and he is strongly interested in exploring government service after law school. I am certain that Nick will have an outstanding legal career and be successful in whatever path he chooses.

For all these reasons, I recommend Nick Busher for a clerkship in your chambers without reservation.

Please do not hesitate to contact me if I can be of further assistance as you consider his application. You can reach me by email at ralford@nd.edu or on my cell at 310-729-3924.

Sincerely,

Roger P. Alford

Roger Alford - ralford@nd.edu - (574) 631-3771

Notre Dame Law School
1100 Eck Hall of Law
Notre Dame, IN 46556

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to commend to you an excellent candidate for a clerkship in your chambers. Nick Busher was one of my best students in both my 1L course on Criminal Law and my upper-level class on Criminal Adjudication.

Nick has many virtues that would make him a fantastic clerk. He is intelligent and insightful, approaching each legal question with care and with rigor. Nick was invariably prepared for my classes. He frequently volunteered to address thorny questions that prompted his peers to look down at their notes in sudden concentration. He displayed agility and even playfulness of mind; when I would push back on his analysis, he would think about my objections and take them into account.

The final exams that Nick wrote for Criminal Law and Criminal Adjudication were some of the best in these classes. He deftly laid out the issues and supported his conclusions with very well-reasoned arguments. They were superb both in substance and style.

Beyond his obvious intelligence and skill, moreover, Nick has a wonderful personality—he is humble and easy-going, with a ready smile and a gracious approach to everyone, from professors to peers. In addition, Nick is eager to engage with others, even those who seem to share very different perspectives or political views, and he is always open to seeking common ground. In a frequently polarizing world, Nick is the kind of person who draws people back together and opens them up to reasoned dialogue. He would no doubt be an asset and delight to have in chambers.

Please do not hesitate to reach out to me if you have any questions (cell 312-771-3448 or email mmcleod2@nd.edu).

Warmly,

Marah Stith McLeod

Marah Stith McLeod - marah.s.mcleod.16@nd.edu - 574-631-5487

NICHOLAS R. BUSER
(937) 430-3710 • nbusher@nd.edu
8820 Olde Farm Lane, Dayton, OH 45458

WRITING SAMPLE

The below excerpt is part of a bench memorandum that I prepared in July 2022 for the Hon. Michael J. Newman of the United States District Court for the Southern District of Ohio. The case at hand involved a § 1983 suit brought by a state prisoner against her correctional facility; this memo analyzed the facility's motion to dismiss all claims. This version of the memo is entirely my own work, and I received permission from Judge Newman to use it as a writing sample.

To provide further background, plaintiff Camilia Terry was convicted of murder and sentenced to a thirty-year-to-life term in state prison. While serving her sentence at Dayton Correctional Institute (DCI), Terry attempted to appeal her conviction, but claimed that she was unconstitutionally prevented from doing so by DCI staff and guards. The attached excerpt analyzes two of Terry's constitutional claims:

1. Access to the Courts: Terry claimed that prison staff violated her right of access to the courts when they (a) refused to let her access legal documents that were relevant to her appeals, and (b) unexpectedly closed the prison's research library for weeks, causing Terry to miss a mandatory filing deadline for one of her appeals.
2. Free Speech: Terry claimed that prison staff violated her right to free speech when they searched certain legal correspondence addressed to Terry outside of her presence.

All other necessary context is present in the excerpt, which omits the following sections from the original memo: Table of Contents, Factual Background, Procedural History, Legal Standard, Summary of Argument, Analysis of Retaliation Claims, and Final Conclusion.

III. ACCESS TO THE COURTS

Terry alleges in Count I that Defendants twice violated her right to access the courts: first when they refused to let her access her stored legal documents, and again when they caused her to miss the filing deadline for her Supreme Court petition. As currently pleaded, neither instance states a claim; however, Terry should be given leave to properly amend her complaint.

A. Underlying Claims

Prison inmates have a First Amendment right to access the courts. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977). To invoke this right, an inmate must show that actual injury arose from defendant's conduct. *Lewis v. Casey*, 518 U.S. 343, 351 (1996). To meet this actual-injury requirement, an inmate must "demonstrate that a nonfrivolous legal claim ha[s] been frustrated or was impeded." *Id.* at 353. This underlying legal claim, "whether anticipated or lost, is an element that must be described in the complaint." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). The underlying claim is held to the same pleading standard as a normal complaint, *see id.* at 417, and as such, it requires more than just "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Here, Terry fails to sufficiently plead the frustrated underlying complaints that gave rise to her injury. The only description Terry gives of these underlying complaints is that they involved "a number of indirect appeals of her criminal convictions" and that they were "not frivolous and based on substantial grounds." Doc. No. 52 at PageID 611; Doc. No. 70 at PageID 689. This level of detail fails to meet the pleading standard for a normal complaint, and is instead the type of formulaic, wholly conclusory statement that fails to state a claim. *See Iqbal*, 556 U.S. at 678.

Perhaps anticipating this finding, Terry's counsel argues that because her incarceration has greatly limited her ability to meet with representation, at a minimum Terry should be granted leave to amend her underlying complaints. Doc. No. 70 at PageID 695. To decide whether it would be worthwhile to grant this request, the following section assumes Terry's underlying complaints are sufficiently pleaded.

B. Assuming Sufficient Underlying Complaint

In such a scenario, Terry must still show that Defendants caused actual injury by substantially frustrating or impeding her ability to access the courts system. *See Lewis*, 518 U.S. at 353. This standard requires that prison staff deprive inmates of a “reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.” *Hill v. Dailey*, 557 F.3d 437, 439 (6th Cir. 2009) (quoting *Lewis*, 518 U.S. at 351). To prove such a deprivation, inmates must do more than show that they were denied access “in some theoretical sense.” *Lewis*, 518 U.S. at 351; *see also Colvin v. Schaublin*, 113 F. App’x 655, 657 (6th Cir. 2004) (finding that even though defendants negligently failed to complete inmate’s appeal, there was no actual injury because appeal would have been dismissed regardless of defendant’s conduct due to a separate error on inmate’s part).

An inmate is deprived of this reasonably adequate opportunity, for example, when a prison causes the inmate to miss a court-imposed deadline. *Harbin-Bey v. Rutter*, 420 F.3d 571, 578 (6th Cir. 2005). Similarly, a prison library can cause actual injury if an inmate’s ability to bring a harm in front of the courts is stymied due to the library’s own negligence or inadequacy. *See Lewis*, 518 U.S. at 350. For instance, if an inmate loses an appeal because the library failed to inform the inmate of some technical requirement that the inmate shouldn’t have reasonably been aware of, actual injury has occurred. *Id.*

1. Legal Materials

Here, Terry’s lack of access to her legal materials still fails to support an access-to-the-courts claim. While her lack of access to the materials may have been inconvenient, there is no indication that it denied Terry a “reasonably adequate opportunity” to challenge her sentence or conditions of confinement in court. *See Hill*, 557 F.3d at 439. This is because Terry fails to allege that any court-related harm—such as missing a filing deadline or losing an appeal—occurred due to her restricted access. *See Harbin-Bey*, 420 F.3d at 578. As such, no actual injury took place, and the Complaint as it stands now cannot support a claim. However, Terry could be granted leave to amend with more details on the specific court-related harm she suffered from her restricted access.

2. Legal Library

The legal library's conduct violated Terry's right to access the courts, as it significantly hindered her ability to file a petition in the following ways:

- Mailroom staff received the original denial of Terry's petition on December 11, but due to a processing error, did not notify Terry of this denial until December 19. This cut off eight of the twenty-five days Terry should have had to file a petition for rehearing. Doc. No. 52 at PageID 614.
- After Terry filled out the required petition form, Defendant Mobley—the prison law librarian—explicitly told Terry that he would provide her with required photocopies of the petition on December 21, and then failed to do so. *Id.*
- After failing to make these copies, Mobley left for vacation the very next day, which effectively closed the library until after the filing deadline. *Id.* at PageID 615.

Viewing these facts in a light most favorable to Terry, she acted reasonably at every turn: she completed the petition within forty-eight hours of finally receiving it from the mailroom, she immediately asked the library to make copies, and she was explicitly told by a legal librarian that said copies would be ready for her at a specified time and date. There is no indication that Terry should have known Mobley would fail to deliver these copies on said date, or that his subsequent vacation would effectively close the library until after the filing deadline. Thus, Defendants' conduct directly caused Terry to miss the deadline—an actual injury.

Defendants contend that this is irrelevant because Terry, in accordance with Supreme Court procedure, could have technically handwritten the ten required copies instead of using a photocopy machine. *See* Doc. No. 71 at PageID 698-99. However, there may not have been any reasonable way for Terry to learn of this method before the deadline. Mobley explicitly promised to make the copies, and by the time it was apparent he would not do so, the library was already closed, meaning Terry had no way to research alternative options. Furthermore, there is no indication that prison staff ever informed Terry of the handwritten option, or that there were any other reasonable ways for Terry to discover the handwritten method after the library's closure. As *Lewis* establishes, actual harm can occur in scenarios where some unknown technical requirement is missed due to the prison's inadequacy. 518 U.S. at 350. Here, Defendants' conduct imposed a

substantial hindrance on Terry’s ability to file her petition, and said conduct resulted in actual harm when Terry missed her filing deadline. Thus, the law library’s conduct supports an access-to-the-courts claim.

C. Conclusion & Recommendation

As it stands now, Terry’s allegations do not support an access to the courts violation because Terry fails to adequately describe the relevant underlying claims. However, if these underlying claims are properly amended, the law library’s conduct would support a claim. For this reason, Terry should be granted leave to amend her descriptions of the underlying complaints. She should also be given the opportunity to allege what actual injury resulted from her lack of access to legal materials.

IV. SEARCHES OF PLAINTIFF’S LEGAL MAIL

In Counts II and III, Terry alleges three specific incidents of unlawful legal-mail searches: the April 2020 letter from the District Court, the September 2020 letter from the Clerk of Courts, and the undated returned-to-sender letters that were searched upon their return to Terry. Defendants raise several arguments, but at this stage, none defeat Terry’s claim that the searches violated her First Amendment rights.

A. Letters from U.S. District Court and Clerk of Courts¹

1. Opt-In Policy

Prison inmates have a First Amendment right to receive mail. *Sallier v. Brooks*, 343 F.3d 868, 873 (6th Cir. 2003). This right is even stronger when the mail in question is “legal mail.”² *See Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996). However, this right is not absolute, and prison staff may impose restrictions on it that are “reasonably related to security or other legitimate penological objectives.” *Id.* (citing *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992)); *see*

¹ Note: while much is made on both sides about the prison’s control-number policy, these first two incidents (the letters from the District Court and Clerk of Courts) took place before any such policy was implemented. As such, no analysis of the policy’s constitutionality is needed in Section IV.A.

² *See infra* Section IV.A.2 for an extensive discussion on the definition of “legal mail.”

Lavado v. Keohane, 992 F.2d 601, 607 (6th Cir. 1993) (“[P]rison officials may open prisoners’ incoming mail pursuant to a uniform and evenly applied policy with an eye to maintaining prison security.”).

To accommodate both inmate and prison interests, prison staff are allowed to search inmates’ legal mail, but only if the inmate is present while they do so. *Sallier*, 343 F.3d at 874. However, an inmate’s right of presence is not automatic, as prisons can implement “opt-in” policies that require inmates to affirmatively request that they be present for legal-mail searches. *See Knop*, 977 F.2d at 1012. If a prisoner fails to make such a request, prison staff are free to search the inmate’s legal mail with or without the inmate’s presence. *Id.* Opt-in policies are not mandatory, and to be validly implemented, prison staff must provide inmates with written notice of the policy prior to its enactment. *Sallier*, 343 F.3d at 874.

Here, there is no indication that an opt-in policy ever existed, or, even if it did, that Terry was ever given notice of such a policy. In 2020, the ODR’s legal mail policy was governed by a previous version of Ohio Admin. Code § 5120-9-17(B)(2),³ which read:

“Legal mail” is mail addressed to an inmate clearly bearing the return address of an attorney-at-law, a public service law office, a law school legal clinic, court of law, or the correctional institution inspection committee. *It may be opened and inspected only in the presence of the inmate-addressee.*

OAC § 5120-9-17(B)(2) (emphasis added). Contrary to requiring an opt-in policy, this regulation does the opposite—it affirmatively requires inmates to be present during searches. Defendants provide no other support for their opt-in defense, nor do they allege that Terry ever received written notice of such a policy, as required by *Sallier*. Thus, an opt-in argument cannot defeat Terry’s claim at this stage.

2. “Clerk of Courts” as Legal Mail

Defendants next argue that a letter from the Clerk of Courts does not fall under the category of legal mail. Doc. No. 71 at PageID 701. What constitutes “legal mail” is a question of law

³ The current version of this regulation was implemented on April 8, 2022. The 2020 version is largely the same, except it made no mention of control numbers.

decided by this Court. *Sallier*, 343 F.3d at 873. Legal mail includes all correspondence that is “properly and clearly marked as legal materials.” *Kensu*, 87 F.3d at 174. However, not all correspondence that a prisoner receives from a legal source is necessarily legal mail. *Sallier*, 343 F.3d at 874. Instead, the relevant question is whether the correspondence “impacts upon or has import for the prisoner’s legal rights, the attorney-client privilege, or the right of access to the courts.” *Id.*; see also *ACLU v. Livingston Cnty.*, 796 F.3d 636, 644 (6th Cir. 2015) (“[T]he key issue is whether [an] attorney and inmate have a fundamental interest in maintaining the confidentiality of communications relating to a legal matter . . .”).

Caselaw suggests that correspondence from a court clerk can sometimes warrant protection, but only if such correspondence complies with valid prison regulations. See *Merriweather v. Zamora*, 569 F.3d 307, 311 (6th Cir. 2009) (noting that while correspondence from a federal clerk of court could theoretically be legal mail, the envelope in question did not qualify because it was not properly labeled under Bureau of Prisons regulations). Other holdings have shown a hesitancy to label clerk-of-courts correspondence as legal mail. See, e.g., *Sallier*, 343 F.3d at 876 (concluding correspondence from a county clerk is not legal mail because a county clerk “is not someone who can provide legal advice about a prisoner’s rights or direct legal services and is not someone with authority to take action on behalf of a prisoner”); *Martin v. Brewer*, 830 F.2d 76, 78 (7th Cir. 1987) (concluding correspondence from a court clerk is usually not legal mail because “with minute and irrelevant exceptions all correspondence from a court to a litigant is a public document, which prison personnel could if they want inspect in the court’s files”). But see *Merriweather*, 569 F.3d 307 at 311 (holding a letter from the Clerk of Courts can be legal mail).

Here, there is insufficient support at this stage to conclusively determine that the Clerk of Courts correspondence is or is not legal mail. While Ohio Admin. Code § 5120-9-17 does not include court clerks in their list of legal-mail entities, this is not dispositive, as there is still the question of whether the correspondence impacted upon or had import for “the prisoner’s legal rights, the attorney-client privilege, or the right of access to the courts.” *Sallier*, 343 F.3d at 874. Here, more information should be gathered on: (1) whether this Clerk of Courts often sends correspondence that impacts prisoners’ confidential legal rights; (2) the labeling of the envelope; and (3) the actual contents of the mail itself. Without more details in these areas, it is impossible to conclusively label the letter as legal or non-legal mail. As such, it should survive to discovery.

3. Isolated Incident vs. Routine

Finally, Defendants argue that *isolated* violations of an inmate's legal-mail rights, as opposed to routine interferences, do not give rise to a constitutional violation. *See* Doc. No. 71 at PageID 701-02. However, the only Sixth Circuit case that Defendants cite in support of this argument is *Okoro v. Scibana*, 63 F. App'x 182 (6th Cir. 2003). Specifically, Defendants quote *Okoro* as holding that a "random and isolated incident of mail interference is insufficient to establish a constitutional violation." Doc. No. 71 at PageID 702 (quoting *Okoro*, 63 F. App'x at 184). However, in the context of that case, the quoted language was referring specifically to *general-mail* violations, and a separate analysis was used for legal-mail claims. *See Okoro*, 63 F. App'x at 184. Furthermore, the violations in that case revolved around improper *processing* of an inmate's legal-mail, not improper searches. *Id.* Thus, *Okoro* cannot be relied on as precedent for holding isolated mail searches constitutional.

Instead, while it is true that "random interference with a prisoner's mail based upon a reasonable suspicion that the prison's security was being jeopardized is constitutionally permissible, the 'arbitrary opening and reading of . . . mail [with] [n]o justification other than harassment' may violate the First Amendment." *Reener v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992) (alterations in original) (quoting *Parrish v. Johnson*, 800 F.2d 600, 604 (6th Cir. 1986)). Thus, an "isolated incident" defense is more likely to succeed if defendant's harmful conduct can reasonably be attributed to negligence or innocent mistake, as opposed to a blatantly unreasonable or intentional act. *See Sallier*, 343 F.3d at 880 (concluding prison staff's inability to follow clear legal-mail procedures on three separate occasions represented an "objectively unreasonable" constitutional violation); *Reener*, 975 F.2d at 260 (reasoning any intentional, arbitrary interference can give rise to a claim, no matter how isolated).

Here, the April letter was labeled "United States District Court." Doc. No. 52 at Page ID 616. Given that Ohio Admin. Code § 5120-9-17(B)(2) specifically lists a "court of law" as one of five officially designated legal-mail entities, it is not unreasonable to view Defendant's decision to search the letter as "arbitrary" or "objectively unreasonable." *See Sallier*, 343 F.3d at 880; *Reener*, 975 F.2d at 260. Additionally, even though Defendants presumably knew that Terry filed a grievance about the first search (and as such should have been on increased notice about improper searches), they still searched the Clerk of Courts letter only five months later. This makes it less

likely that the searches were simply negligent or innocent mistakes. Given that the occurrence of three unreasonable searches was sufficient to support a claim in *Sallier*, there is no reason the same cannot be true of two. As such, the claim should survive dismissal.

B. Returned Mail

We next move to the searches of Terry’s returned-to-sender mail. Terry claims this returned mail comprised of letters addressed to “various law firms and other public legal entities” in the area. Doc. No. 52 at PageID 616. It is unclear when (or how many of) these searches took place. This uncertain timeline is particularly important because in October 2021, the DCI implemented a “control-number policy” that required inmates to label legal mail with a designated control number. *See* 75-MAL-03.⁴ As such, we must analyze the validity of the returned-to-sender searches both pre-control number policy and post-control number policy.

1. Pre-Control Number Policy

DCI does not appear to have a separate policy specifically governing the search of returned-to-sender mail—all items are simply treated as either “incoming mail” under Ohio Admin. Code § 5120-9-17, or “outgoing mail” under Ohio Admin. Code § 5120-9-18. The former specifically requires legal mail to bear the *return* address of a legal entity, while the latter requires it to bear the *mailing* address of a legal entity. Using this language, Defendants argue that because the returned mail was presumably processed as incoming mail, the alleged searches were valid under § 5120-9-17 because “there is no indication in Plaintiff’s Complaint that any of these returned requests bore the *return* address of an attorney, a public service law office, a law school legal clinic, a court of law, or the correctional institution inspection committee.” Doc. No. 71 at PageID 701 (emphasis added).

Even if one adopts Defendants’ hyper-literal interpretation of the regulation, a legal mail analysis must still conclude by asking whether the correspondence in question was likely to impact upon or have import for the prisoner’s legal rights. *See Sallier*, 343 F.3d at 874. Here, if the envelopes were clearly marked “Return to Sender” with “Attorney at Law” written in the mailing

⁴ [https://drc.ohio.gov/Portals/0/Policies/DRC%20Policies/75-MAL-03%20\(Feb%202022\).pdf?ver=nT1qdXF3eBZ4MXtKZkElhw%3d%3d](https://drc.ohio.gov/Portals/0/Policies/DRC%20Policies/75-MAL-03%20(Feb%202022).pdf?ver=nT1qdXF3eBZ4MXtKZkElhw%3d%3d).

address, it should have been obvious that the letters were legal mail, even if they technically did not bear the *return* address of an attorney. Additionally, although Defendants preemptively assume that the returned mail was processed as incoming mail, there is nothing in the record to automatically support this assumption. Without more clarity in these areas, it is inappropriate to dismiss the claim at this stage.

2. Post-Control Number Policy

A “control number” is a unique code that is assigned to each prisoner. It is most often used to designate legal mail—if a prisoner wants correspondence to be treated as legal mail, they must label it with their control number. *See* 75-MAL-03. If this control number is not present, prison staff are free to treat the correspondence as ordinary non-legal mail. *Id.*

The Sixth Circuit has not yet addressed the facial validity of control numbers, and in general, caselaw on the issue is relatively sparse. However, the courts who *have* broached the subject have generally upheld these policies. *See, e.g., Whitman v. Gray*, No. 5:19-cv-01818, 2022 WL 621553, at *2 (N.D. Ohio Mar. 3, 2022) (upholding control number policy because the policy’s goal of limiting the flow of contraband into prison was “reasonably related to security or other legitimate penological objectives” (quoting *Sallier*, 343 F.3d at 873)); *Fontroy v. Beard*, 559 F.3d 173, 183 (3d Cir. 2009) (concluding control number policies are a constitutional way to ensure that “letters marked privileged are actually from [appropriate legal-mail entities]” (quoting *Wolff v. McDonnell*, 418 U.S. 539, 576-77 (1974))).

Under 75-MAL-03, any mail that lacks a control number can be searched and processed as if it is regular non-legal mail. If a control number is present, staff must follow the standard legal mail guidelines laid out in Ohio Admin. Code § 5120-9-17 and 5120-9-18. Additionally, even if a control number is expired or incorrectly labeled, prison staff must still contact the sender and ask if they intended to send the letter as legal mail. 75-MAL-03. None of these requirements seem inherently unreasonable, and Terry acknowledges in her Complaint that a stated goal of 75-MAL-03 is to “prevent contraband from entering ODRC facilities through the legal mail system.” Doc. No. 52 at PageID 618. Such a goal is certainly “reasonably related to security or other penological interests.” *Sallier*, 343 F.3d at 873. As such, 75-MAL-03 is constitutional on its face.

As applied here, if any of the returned letters in question were searched after the implementation of 75-MAL-03, they only needed to be treated as legal mail if they were labeled with a control number. As it stands now, however, there are still too many uncertainties about when the letters were searched and how the letters were labeled to warrant dismissal at this stage.

C. Conclusion & Recommendation

Terry's allegations concerning the letter from the United States District Court and Clerk of Courts are sufficient to survive the pleading stage. While caselaw suggests mail from a court clerk is not typically legal mail, here, the nature of the letter is sufficiently unclear as to warrant proceeding to the discovery stage. Similarly, the alleged searches of the returned-to-sender mail should not be dismissed at this stage, as more information is needed on the nature of their processing, their labeling, and the dates on which they were mailed, returned, and searched.

Applicant Details

First Name	Brantley											
Last Name	Butcher											
Citizenship Status	U. S. Citizen											
Email Address	brantleybutcher@uchicago.edu											
Address	<table> <tbody> <tr> <td>Address</td> </tr> <tr> <td>Street</td> </tr> <tr> <td>5454 S Shore Dr., Apt. 424</td> </tr> <tr> <td>City</td> </tr> <tr> <td>Chicago</td> </tr> <tr> <td>State/Territory</td> </tr> <tr> <td>Illinois</td> </tr> <tr> <td>Zip</td> </tr> <tr> <td>60615</td> </tr> <tr> <td>Country</td> </tr> <tr> <td>United States</td> </tr> </tbody> </table>	Address	Street	5454 S Shore Dr., Apt. 424	City	Chicago	State/Territory	Illinois	Zip	60615	Country	United States
Address												
Street												
5454 S Shore Dr., Apt. 424												
City												
Chicago												
State/Territory												
Illinois												
Zip												
60615												
Country												
United States												
Contact Phone Number	765-639-5993											

Applicant Education

BA/BS From	Yale University
Date of BA/BS	May 2019
JD/LLB From	The University of Chicago Law School
	https://www.law.uchicago.edu/
Date of JD/LLB	June 1, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	University of Chicago Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Jessup International Law Moot Court
	Hinton Moot Court

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Hallett, Nicole
nhallett@uchicago.edu
773-702-9611

Kim, Hajin
hajin@uchicago.edu
773-702-9494

Huq, Aziz
huq@uchicago.edu
773-702-9566

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brantley Butcher
5454 S. Shore Dr., Apt. 424
Chicago, IL 60615
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(765) 639-5993

June 12, 2023

The Honorable Jamar K. Walker
United States District Judge
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of Chicago Law School. I write to apply for a clerkship in your chambers for the 2024–2025 term.

By serving as a judicial law clerk, I hope to hone the research and writing skills I have developed before and during law school. Before law school I worked as an editor at a pharmaceutical marketing agency, where I was promoted early to a managerial role in the editorial department. In law school I have written briefs filed in the Seventh Circuit through the Immigrants' Rights Clinic, edited my peers' work as a Comments Editor on *The University of Chicago Law Review*, and presented oral argument on a brief I wrote as a semifinalist in the Hinton Moot Court. During my law school summers, I have prepared research memoranda both as an intern in the Civil Fraud Section of the Department of Justice and as a summer associate at Jenner & Block in Washington, DC. Clerking in your chambers would allow me to build on these skills while deepening my knowledge of federal procedure and the federal courts.

A resume, transcript, and writing sample are enclosed. Letters of recommendation from Professors Nicole Hallett, Aziz Huq, and Hajin Kim will arrive under separate cover. Should you require additional information, please do not hesitate to reach out. Thank you for your consideration.

Sincerely,

/s/ Brantley Butcher

Brantley Butcher

brantleybutcher@uchicago.edu | (765) 639-5993 | 5454 S. Shore Dr., Apt. 424 | Chicago, IL 60615

Education

The University of Chicago Law School | Chicago, IL June 2024

Juris Doctor Candidate

Journal: *The University of Chicago Law Review*, Comments Editor

Award: Thomas R. Mulroy Prize for Excellence in Appellate Advocacy (awarded to Hinton Moot Court semifinalists)

Moot Courts: Hinton Moot Court; Jessup International Law Moot Court

Activities: OutLaw, Treasurer; Environmental Law Society, Events Coordinator; Orientation Leader

Yale University | New Haven, CT

May 2019

Bachelor of Science in Chemistry

Capstone Essay: Third-Generation Solar Cells and the Future of Solar Energy

Award: Summer Ambassador 2017 (designed and won funding for a service project that delivered food to eleven families experiencing food insecurity in rural Indiana)

Experience

Jenner & Block | Washington, DC

May 2023–July 2023

Incoming Summer Associate

The University of Chicago Law School, Immigrants' Rights Clinic | Chicago, IL

Sept. 2022–Present

Student Attorney

- Collaborated with a team to research and write an appellate brief challenging a noncitizen's removability.
- Helped prepare asylum and green card applications for a noncitizen and his family.
- Provided legal guidance on immigration issues to members of Centro de Trabajadores Unidos.

The University of Chicago Law School, Professor Hajin Kim | Chicago, IL

June 2022–Sept. 2022

Research Assistant (part time)

- Reviewed motions from mass tort cases that ended in settlement to gather data on how the framing of settlement values affects the settlement amount plaintiffs received.

Department of Justice, Civil Division | Washington, DC

May 2022–July 2022

Commercial Litigation Branch, Fraud Section Intern

- Researched and wrote legal memoranda for cases involving Medicare, medical procurement, and defense procurement fraud litigated under the False Claims Act.
- Observed depositions and an investigatory interview and attended litigation strategy meetings.
- Reviewed a draft brief and suggested edits.

Communication Partners Group | New York, NY

Oct. 2019–July 2021

Medical Associate Editor (Aug. 2020–July 2021)

Medical Editorial Assistant (Oct. 2019–Aug. 2020)

- Fact-checked, copyedited, proofread, and wrote copy for scientifically technical promotional materials created for client biotech and pharmaceutical companies.
- Corresponded with clients to ensure promotional materials met legal, educational, and brand requirements.
- Promoted early to managerial role. Managed and trained a newly hired editorial assistant.

Fahe | Lexington, KY

May 2018–Aug. 2018

Policy and Membership Intern

- Researched and wrote memoranda on the economic impact of the opioid epidemic, treatments for opioid addiction, and access to rural healthcare for nonprofit that fights poverty in Appalachia.

Interests

Tennis, creative writing, science fiction novels/movies, and cooking



Name: Brantley Allan Butcher
Student ID: 12335003

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Yale University
New Haven, Connecticut
Bachelor of Science 2019

Beginning of Law School Record

		Autumn 2021		
Course	Description	Attempted	Earned	Grade
LAWS 30101	Elements of the Law William Baude	3	3	177
LAWS 30211	Civil Procedure Diane Wood	4	4	177
LAWS 30611	Torts Saul Levmore	4	4	177
LAWS 30711	Legal Research and Writing Aneil Kovvali	1	1	180

		Winter 2022		
Course	Description	Attempted	Earned	Grade
LAWS 30311	Criminal Law Jonathan Masur	4	4	180
LAWS 30411	Property Aziz Huq	4	4	178
LAWS 30511	Contracts Douglas Baird	4	4	178
LAWS 30711	Legal Research and Writing Aneil Kovvali	1	1	180

Spring 2022

Course	Description	Attempted	Earned	Grade
LAWS 30712	Legal Research, Writing, and Advocacy Aneil Kovvali	2	2	182
LAWS 30713	Transactional Lawyering David A Weisbach	3	3	182
LAWS 40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	179
LAWS 43368	Legal History of the Founding Era Farah Peterson	3	3	180
LAWS 44201	Legislation and Statutory Interpretation Farah Peterson	3	3	180

Autumn 2022

Course	Description	Attempted	Earned	Grade
LAWS 43200	Immigration Law Amber Hallett	3	3	182
LAWS 43228	Local Government Law Lee Fennell	3	3	179
LAWS 43246	Health Law and Policy Jack Bierig	3	3	178
LAWS 90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS 95030	Moot Court Boot Camp Rebecca Horwitz Madeline Lansky	2	2	P

Honors/Awards
The Thomas R. Mulroy Prize, for excellence in appellate advocacy and oral argument in the Hinton Moot Court Competition

Winter 2023

Course	Description	Attempted	Earned	Grade
LAWS 40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	176
LAWS 40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	177
LAWS 52003	Judicial Opinion Writing Robert Hochman Gary Feinerman	3	3	179
LAWS 90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS 94110	The University of Chicago Law Review Anthony Casey	2	2	P
LAWS 95020	Hinton Moot Court Competition Anup Malani Sarah Konsky Hajin Kim	0	0	P



Name: Brantley Allan Butcher
Student ID: 12335003

University of Chicago Law School

Spring 2023					
Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	177
LAWS	46001	Environmental Law: Air, Water, and Animals Hajin Kim	3	3	178
LAWS	53425	Constitutionalism After Al Aziz Huq	3	3	183
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94110	The University of Chicago Law Review	1	1	P
Req		Meets Substantial Research Paper Requirement			
Designation:		Anthony Casey			

End of University of Chicago Law School

OFFICIAL ACADEMIC DOCUMENT



THE UNIVERSITY OF
CHICAGO

Key to Transcripts
of
Academic Records

1. **Accreditation:** The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit <http://csl.uchicago.edu/policies/disclosures>.

2. **Calendar & Status:** The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. **Course Information:** Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. **Credits:** The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

- I **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
- IP **Pass (non-Law):** Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR **No Grade Reported:** No final grade submitted
- P **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q **Query:** No final grade submitted (College only)
- R **Registered:** Registered to audit the course
- S **Satisfactory**
- U **Unsatisfactory**
- UW **Unofficial Withdrawal**
- W **Withdrawal:** Does not affect GPA calculation
- WP **Withdrawal Passing:** Does not affect GPA calculation
- WF **Withdrawal Failing:** Does not affect GPA calculation
- Blank:** If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H Honors Quality
- P* High Pass
- P Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

6. **Academic Status and Program of Study:** The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. **Doctoral Residence Status:** Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a

University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled *Pro Forma* does not extend the maximum year limit on registration.

8. **Law School Transcript Key:** The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. **FERPA Re-Disclosure Notice:** In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

Revised 09/2016



THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

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PHONE 773-702.9611 | FAX 773-702-2063
E-MAIL nhallett@uchicago.edu
www.law.uchicago.edu

Nicole Hallett
Clinical Professor of Law

May 17, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Brantley Butcher Clerkship Application

Dear Judge Walker:

I write to recommend Brantley Butcher for a clerkship in your chambers. I direct the Immigrants' Rights Clinic (IRC) at the University of Chicago Law School. IRC is an experiential course that enrolls eight to ten students per year. I meet with each student individually multiple times each quarter and meet with small student teams each week in addition to the weekly seminar. I also review and provide feedback on many drafts of work product throughout the year and observe and supervise fieldwork events such as client meetings and court appearances. Therefore, I get to know my clinic students very well and have the opportunity to observe them in many different contexts. Brantley joined IRC in September 2022 and I have worked with him for three consecutive quarters. Based on my experience, I believe Brantley will make a superb law clerk.

Brantley has worked on two cases this year, each of which has been challenging and complicated. In the first case, we represent a non-citizen with a final order of removal in a petition for review at the Seventh Circuit. The legal issue concerns the modified categorical approach and has required the students to learn an extremely complex and at times bewildering area of law in addition to understanding the state criminal offense underlying the issue. Brantley has taken the lead on both the principal and reply briefs. Although there are four students working on the case, I have observed that it is Brantley doing the lion's share of the work. His legal research skills have been second to none, and his legal writing skills are already highly developed and have only improved over the course of the year. In addition to writing the arguments I had identified, Brantley developed a novel legal argument that I had not identified based on his comprehensive review of the case law. Brantley was able to work through some potential problems with our arguments over long discussions in our team meetings. He was able to express his reservations about certain arguments succinctly and persuasively. Although oral argument has not been scheduled in the case yet, I plan to ask Brantley to do it given his leading role on the briefs and his prior experience with moot court.

The Honorable Jamar K. Walker

May 17, 2023

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In his other case, we represent a family of Afghans who were evacuated from Afghanistan during the U.S. withdrawal and are now applying for asylum and a special immigrant visa. On this case, I saw a different side of Brantley – his ability to develop trust client relationships, his attention to detail, and his ability to manage and juggle many competing tasks. While the other students on the team focused either on the Seventh Circuit brief or the asylum case, Brantley took a leading role on both. Last week, he called me while I was driving back from a speaking engagement. It was Friday evening and the students had aimed to get the special immigrant applications filed that week. Brantley was in the clinic, finishing up the applications by himself. He had a detailed list of questions that illustrated the immense care he had put into the project.

In sum, Brantley has many talents (as you can see not only from this letter but from the excellent grades Brantley has earned during his law school career). He is an excellent writer and an excellent teammate. He can navigate complex legal arguments in addition to handling the mundane details that are so important in the practice of law and in judicial chambers. I have no doubt that as a law clerk, you would be able to trust him to do a thorough and capable job drafting bench memos and opinions, in addition to all of the other tasks a law clerk must take on.

On a personal level, Brantley is a kind, gentle person who, if anything, cares too much about doing right by his clients, teammates, and supervisors. He is from Indiana (as am I), and I recognize in him a certain Midwestern humility that allows him to excel at what he does without coming across as arrogant or self-satisfied. Brantley is always thinking about how he can improve, how he can do more, how he can be helpful. If I were a judge, I would want to have Brantley in my chambers, and I do not say that about all of my students. Brantley is special and I look forward to seeing what he does in his career. I hope the first step can be a clerkship working for you. I would be happy to speak more about Brantley if it would be helpful to your decision. You can call me at 203-910-1980 or email me at nhallett@uchicago.edu.

Sincerely,



Nicole Hallett
Clinical Professor of Law
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NH/z

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June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
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Dear Judge Walker:

I am excited to recommend Brantley Butcher as a clerk in your chambers. Brantley is a thoughtful and proactive student and delightful person.

I first got to know Brantley when he applied to be a part-time research assistant (RA) for me last summer. Brantley was working full time that summer for the Department of Justice, Civil Division, but he nonetheless used the hours he had for my research quite capably. I asked Brantley and another RA to help me find class action settlement pleadings that presented the settlement figures in different ways (in per person terms or in aggregate terms, summed across all individuals). Brantley took the lead in organizing the mass of materials the two collected, sent me detailed and well-ordered reports on his progress, asked excellent questions that pushed my thinking on the project, and pointed me to big picture issues with the analytical approach that came through from his close reading of the sources. He had a great sense of when to check in before plunging down a particular rabbit hole and, rather than reactively simply complete the tasks I assigned, Brantley proactively thought through how best to further the project. Brantley's work was excellent, and he was a pleasure to work with.

I was thus excited to see his name on Environmental Law class roster this Spring term. Brantley was a great in-class student – he spoke up with real contributions that I could tell he had thought through. He came to office hours with organized and thoughtful questions. He did well in the class, and I'd be thrilled to have him in future classes.

I'd like to make one note about his grades. Brantley's grades generally show an upward trend until Winter Quarter 2023. That quarter appears anomalous because of a heavy workload—outside of class, in addition to writing and arguing a brief in the Hinton Moot Court semifinals, submitting his Comment for Law Review, and writing half of a brief for another moot court, Brantley wrote a Seventh Circuit brief and filed asylum applications for his clinic.

On a personal level, Brantley has a wonderful, friendly demeanor and presence. He grew up in rural Indiana (his town has fewer than 3000 people), and he very much wants to give back to his underprivileged community and communities like it. In college, using funds from a college grant that he applied for, Brantley created a grocery-delivery service to help elementary school children over the summer months when they lose access to free lunch. He is also close with his family and delights in introducing his mom to new foods and experiences outside of those accessible to his family in their small town—apparently bubble tea is a new favorite.

I would be delighted to speak more at length about Brantley's candidacy if at all helpful.

Sincerely,

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May 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Brantley Butcher (University of Chicago Class of 2024), as a law clerk in your chambers. In the academic year 2021-22, I taught Brantley in a mandatory 1L course on Property and an elective 1L course on Constitutional Law (Equality and Due Process). He did very well in both of those classes. Brantley is further enrolled in a seminar I am teaching this term, which is entitled Constitutionalism after AI. To date, he has offered a very strong set of writings and oral contributions to that class. Brantley's very strong performance in my classes is consistent with a larger record of impressive performances across the law school curriculum across the first 18 months of his law school career. It was thus predictable that Brantley would earn a place on the prestigious University of Chicago Law Review, where he has gone on to a managerial role in his second year on the journal. My interactions with Brantley, in addition to his performance in my classes (both on the exam and also in person), strongly suggest that he will be a terrific law-clerk: He is poised, thoughtful, and analytically sharp. In person, he is respectful, but fulsome in his deployment of his formidable analytic resources. I think that any chambers would be rendered more effective, and more intellectually rich, thanks to Brantley's presence. I think would be true for both a district court position and an appellate position. I hence recommend him, without any hesitation, for those roles upon his graduation from the law school.

I will focus first on Brantley's academic performance, taking account of both how he did in my classes and also offering a perspective on his transcript as a whole. As noted, those two 1L classes were Property and Constitutional Law: Equal Protection and Due Process. They are very different in scope and focus. The first is a largely common-law class with a hefty dose of economics and political theory (e.g., Locke and Nozick). The second involves a great deal of history, and focuses on the way in which different moments in constitutional and political history have shaped the selection of controversies and the nature of the doctrinal rules that eventually emerge. The two classes, that is, are very different: They require somewhat different skill sets to excel. Yet in both classes, Brantley obtained a very high "B." In an era of grade inflation generally, this performance will not sound like much—but I want to stress without reservation that these are impressive grades. They place him within the top 15-20% or so each class. And they demonstrate more than enough legal skill to not just manage but to thrive in a federal clerkship. I looked back at Brantley's exams and found them well-written and clear: They suggest that he is a strong writer, even under considerable time pressures.

More generally, Brantley has offered as good or better a performance in almost all his other courses, with his grades getting better across the arc of his first year at the law school. Hence, Brantley has obtained very strong grades in classes as diverse as Transactional Lawyering, Immigration Law, Criminal Law, and Legal History (the Founding Period). This broad range of strong performances suggest that Brantley is not just intellectually capable, but also very nimble: He is able to move between very different topics and still grasp the essentials quickly. Indeed, it is telling that I am able to write a very strong recommendation for Brantley, and I am not even the person who gave him the best grades.

Brantley's grades, moreover, should be understood in the general context of Chicago assessment modalities. Unlike many other law schools, Chicago abjures grade inflation in favor of a very strict curve round a median score of 177 (which is a B in our argot). There is not large movement from the median. Because Chicago grades on a normal distribution, and because it is on the quarter system, it is possible to be very precise about where a student falls in a class as a whole. This is simply not possible with a grading system of the kind used by some of our peer schools, which are seemingly designed to render ambiguous and inscrutable differences between the second tier of students and the third- and fourth-tiers. In Chicago's reticulated grading system, Brantley's scores should be seen as very good ones. They demonstrate not just his deep legal skills, but his strength in comparison to his peers.

At Chicago more generally, Brantley has thrived. As I noted, he has obtained a place on the University of Chicago Law Review, where he is managing now the drafting and publication of comment (or notes) by other students. He also gave an excellent performance in the recent school-wide moot court, and he has participated in the interschool Jessup International Law Moot Court. In addition, he is an active member of both Outlaws and the Environmental Law Society. It is clear both from his record, and my sense of his presence around the law school, that Brantley is both engaged and well-respected by his peers. It is also clear to me that he is leaving the law school a better place than when he arrived.

On the personal side, Brantley is affable and a pleasure to chat with. It is no wonder he is so well liked. In part, Brantley's

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character reflects his early life in an economically depressed area of rural Indiana, where dismaying few went to university after high school—let alone making it to an Ivy League school such as Yale. Brantley has maintained a soft-spoken humility (perhaps one that comes of switching from modest circumstances to the wealth and privilege of Yale), and has kept his eyes on the goal of continuing to contribute to his nation, and his community, through the law. This background also instilled an ethic of hard work in him: He had to study on his own for many early exams, including the SATs, the ACTs, and AP classes. He also faced the challenge of coming out in a deeply conservative culture, and then of reconciling his sexuality with his deeply felt Catholicism.

Finally, Brantley is in the process of accruing much useful legal experience that will be directly relevant to effective performance in a federal clerkship. Last summer, he worked at the Department of Justice's Civil Rights Division in Washington, DC. And this summer, he will be in Jenner and Block's Washington office. I anticipate that he will do very well in that position, and that he would come to federal clerkship with some practical legal skills already developed. I anticipate that he will go on to be either a judge or else find a path in public service of one sort or another after paying off his law-school loans.

Based on all this evidence, I anticipate that Brantley will perform very well in the demanding circumstances of a federal clerkship. I am very happy to offer my unqualified support for his application. Of course, I would be more than happy to answer any questions you have, and can be reached at your disposal at huq@uchicago.edu (and 703 702 9566).

Sincerely,

Aziz Huq
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